

(26,628)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 542.

THE WESTERN UNION TELEGRAPH COMPANY,  
PETITIONER,

*vs.*

GEORGE M. BROWN, EXECUTOR OF THE LAST WILL AND  
TESTAMENT OF WILLIAM LANGE, JR., DECEASED,  
AND J. U. HASTINGS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT.

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~~No. 2007~~

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error.

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant in Error.

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**Transcript of Record.**

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Upon Writs of Error to the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.

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*In the District Court of the United States, in and for  
the Northern District of California, Second  
Division*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant.

**Stipulation and Praeceptum for the Transcript.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the bill of exceptions proposed by defendant herein, as finally settled, allowed and certified by the Judge of said court, and filed herein, may stand for and be the bill of exceptions of plaintiffs on any motion for a new trial in the above-entitled cause hereafter made by plaintiffs, or on any appeal which plaintiffs may hereafter take from the judgment heretofore entered herein or any part thereof, or on any writ of error therefrom hereafter issued, for the same purposes, and to the same extent, and with like effect, as though a separate bill of exceptions in similar form were presented in due time by plaintiffs and were thereupon approved, signed, settled, certified and allowed in such form by the Judge of said court as a full, true and correct bill of exceptions herein proposed by plaintiffs.

IT IS FURTHER STIPULATED that the writ of error issued herein upon the petition of the de-

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fendant and the writ of error issued upon the petition of plaintiffs may be heard and determined in the United States Circuit Court of Appeals for the Ninth Circuit upon the same record, and the clerk of the above-entitled court is hereby requested to issue a certified copy of the record in the above-entitled cause and transmit the same to said Circuit Court of Appeals as follows: [1\*]

1. Complaint.
2. Demurrer to Complaint.
3. Order Overruling Demurrer to Complaint.
4. Answer.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Bill of Exceptions.  
Defendant's Writ of Error.
8. Petition for Writ of Error.
9. Assignments of Error.
10. Order Allowing Writ of Error.
11. Writ of Error.
12. Citation in Error.
13. Stipulation Waiving Costs and Supersedeas  
Bond.
14. Acceptance of Service of Citation.  
Plaintiffs' Writ of Error.
15. Petition for Writ of Error.
16. Assignments of Error.
17. Order Allowing Writ of Error.
18. Writ of Error.
19. Citation in Error.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

20. Acceptance of Service of Citation.

21. Stipulation Waiving Costs Bond.

22. This Praecipe for Transcript.

Said record to be certified under the hand of the clerk and the seal of the above court.

Dated this 4th day of May, 1917.

BEVERLY L. HODGHEAD,  
Attorney for The Western Union Telegraph Com-  
pany, Defendant.

SAMUEL POORMAN, Jr.,  
Attorney for William Lange, Jr., and J. U. Hastings,  
Plaintiffs.

[Endorsed]: Filed May 11, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

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*In the Circuit Court of the United States, Ninth  
Judicial Circuit, in and for the Northern District  
of California.*

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant.

**Complaint.**

The plaintiffs above named complain of the defend-  
ant above named, and for a

**FIRST**

cause of action against it allege:

I. That the plaintiffs are, and at the times of all

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of the matters herein mentioned were, citizens of the State of California, and residents of the Northern District of California.

II. That the defendant is, and at the times of all of the matters herein alleged was, a corporation organized and existing under the laws of the State of New York, and a citizen of the State of New York.

III. That at all of said times said defendant was and still is a telegraph company incorporated for the purposes, among other things, of carrying on, in and through the several states and territories of the United States of America, the business of receiving for transmission, transmitting by telegraph, forwarding and delivering messages, communications, and dispatches for the general public for hire; and that at all of said times it was conducting its said business in and through the states of California and Nevada, and was holding itself out to the general public as so doing, and was maintaining offices throughout the states of California and Nevada for the receiving from the general public of messages, communications and dispatches [3] to be so transmitted, forwarded and delivered.

That at the times of all of the matters herein alleged said defendant maintained an office for carrying on its said business at Number 1062 Broadway, in the City of Oakland, County of Alameda, State of California.

IV. That on or about the 16th day of March, 1907, the plaintiffs had entered into a contract with one W. C. Pitt and one W. T. Campbell, by which said



Pitt and said Campbell had agreed to sell to plaintiffs six hundred and twenty-five thousand (625,000) shares of the capital stock of a corporation organized and existing under the laws of the Territory of Arizona, known as Kennedy Consolidated Gold Mining Company, for the sum of seventy-five thousand (75,000) dollars gold coin, payable in installments, of which amount seven thousand five hundred (7,500) dollars was paid on the execution of said contract, according to the terms thereof, and eleven thousand two hundred and fifty (11,250) dollars was to be paid on or before the first day of May, 1907, and subsequent installments were to be paid at later dates specified in said contract.

That said contract further provided that certificates representing said shares of stock standing in the names of said Pitt and said Campbell, or in the name of either of them, endorsed in blank by the person or persons in whose names they stood, and representing in the aggregate six hundred and twenty-five thousand (625,000) shares of such capital stock should be placed in escrow in and with Lyon County Bank in Yerington, State of Nevada, under an escrow agreement by which said bank should hold said shares of stock and deliver the same to said plaintiffs immediately upon the payment of the full amount of the purchase price specified in said agreement, according to the terms thereof, and it was further agreed, in and by said contract, that in the event of default by said plaintiffs in making any of the [4] payments therein provided for, said bank was

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authorized to redeliver all of the shares of stock so deposited with it pursuant to said agreement to said Pitt and said Campbell, and that all payments theretofore made by said plaintiffs should be forfeited to said Pitt and said Campbell, and that upon such default all rights of each of the parties under said contract should forever cease and determine.

That pursuant to said contract said certificates representing said shares were deposited with said Lyon County Bank, and said Lyon County Bank received same in escrow on or about the 17th day of March, 1907, and held the same, in accordance with said contract.

V. That for the purpose of making the payment mentioned in said contract between plaintiffs and said Campbell, which, by the terms of said contract, had to be made on or before the first day of May, 1907, said plaintiffs, on April 27, 1907, sent by United States mail from said City of Oakland, California, to said Lyon County Bank at Yerington, Nevada, a draft drawn by the Bank of Fruitvale on its San Francisco correspondent, the name of which is now unknown to plaintiffs, for the sum of eleven thousand two hundred and fifty (11,250) dollars United States gold coin, payable to the order of the Lyon County Bank.

That said Bank of Fruitvale then had sufficient credit with its said San Francisco correspondent so that said draft was worth eleven thousand two hundred and fifty (11,250) dollars, gold coin, and would have been honored by it for said amount when duly

presented, and was, in fact, afterwards honored and the sum of eleven thousand two hundred and fifty (11,250) dollars gold coin was actually paid thereon by the drawee thereof.

That said draft, according to the information and belief of said plaintiffs, was received by said Lyon County Bank [5] at Yerington, Nevada, on the 30th day of April, 1907.

VI. That on April 29, 1907, before the message hereinafter mentioned was delivered to said defendant for transmission, as hereinafter alleged, the plaintiffs were informed and believed that the stock of Kennedy Consolidated Gold Mining Company mentioned in said contract between plaintiffs and said Pitt and said Campbell was of little or no value, and, upon such information, said plaintiffs determined to make no further payments on their said contract with said Pitt and said Campbell, and to abandon their rights in and to said stock under said contract, and to withdraw from their transaction with said Pitt and said Campbell.

That on the evening of April 29, 1907, for the purpose of intercepting said draft mailed to said Lyon County Bank before the same should be received or handled by said bank, or credited by it to the account of said Pitt and said Campbell, and before said bank should have any dealings therewith, or should make any payment thereon, said plaintiffs called at said office of the defendant in Oakland, California, and stated to the agent in charge thereof, that they desired immediately to telegraph to the Lyon County

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Bank at Yerington, Nevada, a message in the words and figures following:

“Oakland, April 29, 1907.

“Lyon County Bank,  
Yerington, Nevada.

“Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

“HASTINGS and LANGE.”

That plaintiffs, at the same time, stated to said defendant, through its said agent, that it was absolutely necessary that said message be delivered to said bank therein named [6] before banking hours on the following morning, that is to say, before said bank should open for business on the 30th day of April, 1907, and desired to know of said agent in what manner the said plaintiffs could be absolutely assured that said message would be so delivered. Plaintiffs, at the same time, stated to said defendant, through its said agent, that they had a contract for the purchase of certain shares of stock of a mining company, and that a payment under said contract was required to be made by them on or before the first day of May, 1907, to said Pitt and said Campbell, in said message mentioned, through said Lyon County Bank; or that in default thereof said contract to purchase such stock would by its terms be forfeited, and all rights of all parties thereto would thereupon forever cease and determine. That for the purpose of making said payment they had mailed from Oakland to said Lyon County Bank at said town of Yerington, a certain bank draft in the sum of eleven thousand two

hundred and fifty (11,250) dollars, gold coin of the United States, payable to the order of said Lyon County Bank; that said draft would, in the ordinary course of the mail between said city of Oakland and said town of Yerington, be delivered to said Bank on the following morning, that is to say, during the forenoon of the 30th day of April, 1907; that plaintiffs had, since mailing said draft as aforesaid, learned the facts touching the value of said stock that had determined them to make no further payments under said contract and to forfeit said contract and all moneys by them already paid thereunder; that plaintiffs were seeking, by the message then offered by them to defendant for transmission and delivery to said Lyon County Bank, as aforesaid, to intercept payment by said bank on account of said contract to said Pitt and said Campbell, in said message mentioned of the amount of the face of said draft, to wit: Eleven thousand two hundred and fifty (11,250) dollars, as they were lawfully entitled [7] to do. And it was then and there further stated by said plaintiffs to said agent of defendant, that unless said message was by said defendant transmitted and delivered immediately to said bank at said town of Yerington, before banking hours on the following day, to wit: April 30, 1907, said bank would receive said draft and would make payment of the amount thereof to said Pitt and said Campbell, as aforesaid; in which event said amount would be wholly lost to these plaintiffs, as they did not intend to continue under their contract, having learned that the stock mentioned in said contract, and on account of the

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purchase of which said draft had been mailed as aforesaid, was of little or no value.

That thereupon said defendant, through its said agent, represented to said plaintiffs that defendant would insure the immediate delivery of said message to said bank at said town of Yerington if plaintiffs would pay said defendant the sum of one and forty-five hundredths (1.45) dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington.

That plaintiffs thereupon accepted said proposal of said defendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said message in writing and paid the sum of one and forty-five hundredths (1.45) dollars to said defendant, through its said agent, and said defendant then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent wrote upon said message and immediately below the date thereof, the words "Deliver immediately," and simultaneously therewith accepted said message for immediate transmission to said town of Yerington and for immediate delivery to [8] said bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs.

VII. That if said defendant had immediately or with reasonable promptness transmitted and deliv-

ered said message to said Lyon County Bank, it would have reached said bank at Yerington, Nevada, before said bank would have received said draft mailed to it as aforesaid; and if said bank had received said message before receiving said draft, it would have returned said draft to plaintiffs and would not have placed the amount represented thereby to the credit of said Pitt and said Campbell, or either of them, or paid any amount thereon; but said defendant with gross negligence delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the second day of May, 1907; and before said second day of May, 1907, to wit, on the 30th day of April, 1907, said bank had received said draft mailed to it by plaintiffs, and had paid said Pitt and said Campbell, the amount of said draft without any knowledge on the part of the said bank of the determination of said plaintiffs to withdraw from said contract, and without any knowledge that plaintiffs did not desire to make any further payments under said contract, and without any knowledge of said message; or of the determination of said plaintiffs to recall said draft.

VIII. That plaintiffs did not make any further payments on the purchase price of said shares of stock mentioned, but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon.

IX. That thereafter, to wit, on the 26th day of



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June, 1907, plaintiffs presented to said defendant, through its agent then in charge of its said office in said city of Oakland, their [9] written claim against said defendant for damages suffered by plaintiffs by reason of the facts herein set forth and alleged, in which said claim there was set forth in writing a full, true and correct statement of all of the facts and circumstances out of which said claim arose, as herein more particularly set forth and alleged, and therein claimed of and from said defendant the amount of their said damages, to wit, the sum of eleven thousand two hundred and fifty (11,250) dollars.

X. That by reason of the defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon County Bank, plaintiffs suffered a loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty (11,250) dollars, and that neither the whole nor any part thereof has been paid to plaintiffs, or either of them, or at all.

### SECOND.

And for a second and separate cause of action against said defendant, plaintiffs allege:

I. That each and every allegation in the paragraphs of the first count or cause of action in this complaint numbered I, II, III, IV and V are true, and plaintiffs refer to the same and make same a part of this second count or cause of action with the same force and effect as if here repeated at length.

II. That on April 29, 1907, before the message hereinafter mentioned was delivered to said defend-



ant for transmission as hereinafter alleged, the plaintiffs had been informed and believed that the stock of Kennedy Consolidated Gold Mining Company, concerning which they had contracted with said Pitt and said Campbell as aforesaid, was of little or no value, and plaintiffs upon obtaining such information desired to abandon their said contract with said Pitt and said Campbell, and inasmuch [10] as all moneys paid were upon such abandonment to be lost to plaintiffs, plaintiffs desired to prevent the payment of the amount of the draft which they had mailed to said Lyon County Bank as hereinbefore mentioned; that in order to carry out such desire and particularly to intercept said draft and prevent any money being paid to said Pitt and said Campbell on account of said draft, plaintiffs presented to defendant, at its said office in Oakland, California, for transmission to the Lyon County Bank, at Yerington, Nevada, a written message in the words and figures following, to wit:

“Oakland, April 29th, 1907.

“Lyon County Bank,  
Yerington, Nevada.

“Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

“HASTINGS and LANGE.”

That said message was written on a blank form of the defendant containing on its face the following printed matter:

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"Form No. 260.

**"THE WESTERN UNION TELEGRAPH  
COMPANY.**

Incorporated.

23,000 Offices in America. Cable Service to all the  
world.

**ROBERT C. CLOWRY,**

President and General Manager.

Receiver's No.                      Time Filed.                      Check.

Send the following message subject to the terms  
on back hereof, which are hereby agreed to:

Read the notice and agreement on back."

That on the back of said blank form the following  
printed matter appeared:

**"ALL MESSAGES TAKEN BY THIS COM-  
PANY ARE SUBJECT TO THE FOLLOW-  
ING TERMS: [11]**

"To guard against mistakes or delays, the sender  
of a message should order it REPEATED; that is,  
telegraphed back to the originating office for com-  
parison. For this, one-half the regular rate is  
charged in addition. It is agreed between the sender  
of the following message and this Company, that  
said Company shall not be liable for mistakes or  
delays in the transmission or delivery, or for non-  
delivery of any unrepeated message, beyond the  
amount received for sending the same; nor for mis-  
takes or delays in the transmission or delivery, or  
for non-delivery of any repeated message, beyond  
fifty times the sum received for sending the same,  
unless specially insured, nor in any case for delays  
arising from unavoidable interruption in the work-

ing of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

“Correctness in the transmission of a message to any point on the lines of this Company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated message, viz., one per cent, for any distance not exceeding 1,000 miles and two per cent, for any greater distance. No employee of the Company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

“The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

ROBERT C. CLOWRY,

President and General Manager.”

That said blank form was one furnished by said defendant at its said office for the use of all persons

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desiring to send telegrams, and plaintiffs did not read said blank and were not cognizant of the terms and conditions printed thereon, and the defendant did not call the attention of the plaintiffs [12] or either of them to said terms or conditions, or to any of them.

That before ordering said message sent the plaintiffs stated to the defendant the following facts concerning the same, to wit: That they, the plaintiffs, had entered into a contract with said Pitt and said Campbell, the persons named in said message by which they, the plaintiffs, were to purchase from said Pitt and said Campbell certain shares of stock of a mining corporation; that said contract called for partial payments through the Lyon County Bank at Yerington, Nevada, and also gave the plaintiffs the right to withdraw from said contract at any time provided they forfeited the payments already made; that they, plaintiffs, had already made one payment and that another payment by the terms of said contract was required to be made by May 1, 1907; that plaintiffs, in order to provide for such latter payment, had mailed from Oakland to the Lyon County Bank at Yerington, Nevada, a bank draft for the sum of eleven thousand two hundred and fifty (11,250) dollars; and that since mailing the same they, the plaintiffs, had learned that such stock was practically worthless, and that they desired to abandon their said contract with said Pitt and said Campbell and not make any further payments thereon, and that the purpose of their proposed telegram was to save the money represented

by said eleven thousand two hundred and fifty (11,250) dollar draft, which could be done provided said telegram should reach said Lyon County Bank at Yerington, the next morning before banking hours, otherwise the amount would be lost to plaintiffs because in the ordinary course of the mail said draft would be received by said Lyon County Bank early the next morning, to wit, April 30, 1907, and that accordingly it was a matter of absolute necessity for the plaintiffs to have said telegram transmitted and delivered immediately, and they accordingly asked the defendant what could be done to [13] make immediate transmission and immediate delivery to said Lyon County Bank of said message absolutely certain; that defendant informed them that by paying an amount in excess of the regular rates for such messages, the same could be insured, and stated that if the plaintiffs would pay to it, the defendant, the sum of one and forty-five hundredths (1.45) dollars said message would be sent and delivered immediately and that the defendant would insure plaintiffs against all loss or damage that they might sustain arising out of any failure on the part of defendant to immediately send or immediately deliver said message to Lyon County Bank; that thereupon plaintiffs paid the defendant the sum of one and forty-five (1.45) hundredths dollars for the immediate sending and immediate delivery of said message and for the insurance thereof as herein stated, and delivered said message to the defendant which received the same under agreement that it would immediately send and immediately deliver the

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same to said Lyon County Bank at Yerington, Nevada, and that it would insure plaintiffs against all loss or damage that they might sustain arising from any failure on the part of defendant to immediately send or immediately deliver to said Lyon County Bank said message. That thereupon and in the presence of plaintiffs, for the purpose, as plaintiffs understood, of evidencing their said agreement, defendant endorsed in writing on said message the words, "Deliver immediately."

III. That each and every of the allegations in the paragraphs of the first count or cause of action in this complaint numbered VII, VIII, IX and X are true, and plaintiffs refer to the same and make them a part of this count or cause of action with the same force and effect as if here repeated at length.

AND, THEREFORE, plaintiffs demand judgment against defendant for the sum of eleven thousand two hundred and fifty [14] (11,250) dollars, gold coin of the United States, together with interest thereon from the 26th day of June, 1907, and costs of suit.

SAMUEL POORMAN, Jr.,  
FROHMAN & JACOBS,  
Attorneys for the Plaintiffs.

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

William Lange, Jr., being duly sworn, says under oath: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same

is true of his own knowledge except as to the matters therein stated on information or belief, and that as to those matters that he believes it to be true.

WM. LANGE, Jr.

Subscribed and sworn to before me this 27th day of April, 1909.

[Seal]

GEORGE PATTISON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 28, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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*In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,  
Defendant.

**Demurrer.**

Now comes the defendant in the above-entitled action and demurs to said complaint as follows:

Defendant demurs to the first count of plaintiffs' complaint and for ground of demurrer states:

**I.**

That said first count of said complaint does not

state facts sufficient to constitute a cause of action.

II.

That said first count of said complaint does not state facts sufficient to constitute a cause of action in this: That it is not alleged that the said capital stock of said Kennedy Consolidated Gold Mining Company, referred to in said contract between said W. C. Pitt and W. T. Campbell and plaintiffs herein, referred to in said complaint, was, on the 30th day of April, 1907, or at any time, of little or no value or of less value than the amount agreed to be paid therefor by plaintiffs, or that any loss would have occurred to the plaintiffs by performing their said contract with said Pitt and Campbell and completing the purchase of said stock.

III.

That said first count of said complaint does not state facts sufficient to constitute a cause of action in this: It is not alleged that said Lyon County Bank was the agent of [16] said Pitt and Campbell or was authorized to receive said sum of eleven thousand two hundred and fifty (11,250) dollars for their account, or that said draft was forwarded to said Lyon County Bank with any directions that the amount be paid to said Pitt and Campbell upon account of said contract of purchase.

IV.

That said first count of said complaint does not state facts sufficient to constitute a cause of action in this: It is not alleged that plaintiffs' failure to complete said purchase and make the subsequent payments provided by said contracts was due to the



fact that said capital stock was of little or no value or of less value than the amount agreed to be paid therefor, or that plaintiffs, or either of them, had the ability to make said subsequent payments, or any of them, had they desired to do so.

V.

That said first count of said complaint does not state facts sufficient to constitute a cause of action in this: It is not alleged and does not appear from said complaint that defendant would have been guilty of gross or any negligence in failing to deliver said telegraphic message prior to the opening of said Lyon County Bank at ten o'clock on the morning of April 30, 1907.

VI.

Said first count of said complaint is ambiguous in this: That it does not appear from and cannot be ascertained therefrom whether said contract between the plaintiffs and said Pitt and Campbell was a contract of option for the purchase of said capital stock to be exercised at the pleasure of plaintiffs herein or was an absolute obligation to purchase said stock and to pay therefor the sum of seventy-five thousand [17] (75,000) dollars in various installments, as set forth in said complaint.

VII.

Said first count of said complaint is uncertain in the same particulars in which it is herein alleged to be ambiguous.

Defendant demurs to the second count of said complaint, and for ground of demurrer states:

I.

That said second count of said complaint does not state facts sufficient to constitute a cause of action.

II.

That said second count of said complaint does not state facts sufficient to constitute a cause of action in this: That it is not alleged and does not appear therefrom that plaintiffs had any right to withdraw from said contract.

III.

That said second county of said complaint does not state facts sufficient to constitute a cause of action in this: That said alleged verbal contract of insurance of plaintiffs against all loss or damage they might sustain from the failure to make delivery of said message was void and in direct violation and contradiction of the written contract between plaintiffs and defendant under which said message was transmitted and subject to which said contract said message was transmitted, as alleged in said complaint.

IV.

The said second count of said complaint does not state facts sufficient is constitute a cause of action for the same reasons and upon the same grounds as hereinbefore stated as the grounds of demurrer to the first count of said complaint.

WHEREFORE, defendant prays that this demurrer be sustained and that plaintiff take nothing by this action.

BEVERLY L. HODGHEAD,  
Attorney for Defendant. [18]

I hereby certify that, in my opinion, the foregoing demurrer is well founded in points of law.

BEVERLY L. HODGHEAD,

Attorney for Defendant.

Due service of within demurrer and receipt of copy thereof is hereby admitted this 23d day of June, 1909.

SAMUEL POORMAN, Jr.,

FROHMAN & JACOBS,

Attorneys for Plaintiffs.

[Endorsed]: Filed June 23, 1909. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

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At a stated term, to wit, the March term, A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Wednesday, the 23d day of March, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 14,885.

WILLIAM LANGE, Jr., et al.,

vs.

WESTERN UNION TELEGRAPH CO.

**(Order Overruling Demurrer.)**

Defendant's demurrer to the complaint herein heretofore heard and submitted being now fully con-

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sidered and the Court having rendered its opinion orally, it was ordered, in accordance therewith, that said demurrer be and the same is hereby overruled.  
[20]

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*In the Circuit Court of the United States, Ninth  
Judicial Circuit, in and for the Northern Dis-  
trict of California.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a  
Corporation,  
Defendant.

**Answer to Complaint.**

Now comes the defendant in the above-entitled action and answers the complaint of plaintiffs herein as follows:

FIRST.

I.

Defendant says that it has no information or belief upon the subject sufficient to enable it to answer the matters and things set forth and alleged in paragraph IV of said complaint and placing its denial on that ground,

(iv) Denies that on or about the 16th day of March, 1907, or at any other time, or at all, the plaintiffs entered into a contract with W. C. Pitt and W. T. Campbell, or either of them, by which said Pitt and

said Campbell agreed to sell to plaintiffs six hundred and twenty-five thousand (625,000) shares, or any other number of shares, of the capital stock of a corporation known as the Kennedy Consolidated Gold Mining Company, or any other company, for the sum of seventy-five thousand (75,000) dollars, or any other sum, and denies that said contract provided for the payment of seven thousand five hundred (7,500) dollars, on the execution thereof, and denies that by the terms of any such contract referred to in the complaint, the sum of eleven thousand two hundred and fifty (11,250) dollars, or any other sum, was to be paid on or before the first day of May, 1907, or that any other installments [21] were to be paid thereon at any later dates.

Denies that said contract provided that certificates representing said shares of stock, endorsed in blank by the person or persons in whose names they stood, or otherwise, and representing six hundred and twenty-five thousand (625,000) shares, or any number of shares, of such capital stock, should be placed in escrow in and with the Lyon County Bank in Yerington, State of Nevada, under an escrow agreement by which said bank should hold said shares of stock and deliver the same to said plaintiffs immediately upon the payment of the full amount of the purchase price specified in said agreement, according to the terms thereof, or otherwise, or at all, and denies that it was provided in said contract, that in the event of default by said plaintiffs in making any of the payments therein provided for, said bank was authorized to redeliver all, or any, of the shares

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of stock so alleged to be deposited with it pursuant to said agreement, or otherwise, and denies that it was so provided in said contract that all payments theretofore made should be forfeited to said Pitt and said Campbell, or either of them, or that upon such default all rights of each of the parties under said contract should cease or determine.

Denies that pursuant to said contract, or otherwise, any certificates representing said shares, or any number of shares, of said capital stock were deposited with said Lyon County Bank, and denies that said Lyon County Bank received any of said alleged certificates in escrow or otherwise, on or about the 17th day of March, 1907, or at any other time, or held the same, in accordance with said contract, or at all.

II.

Defendant says that it has no information or belief upon the subject sufficient to enable it to answer the matters and things [22] set forth and alleged in paragraph V of said complaint and placing its denial on that ground,

(v) Denies that for the purpose of making the payment mentioned in said contract, or at all, plaintiffs, or either of them, did on the 27th day of April, 1907, or any other time, or at all, send by United States mail from the City of Oakland, California, to said Lyon County Bank, at Yerington, Nevada, a draft drawn by the Bank of Fruitvale on its San Francisco correspondent, for the sum of eleven thousand two hundred and fifty (11,250) dollars, or any

other sum, payable to the order of the Lyon County Bank, or any other person, or at all.

Denies that said Bank of Fruitvale then had sufficient credit with its San Francisco correspondent so that said alleged draft was worth eleven thousand two hundred and fifty (11,250) dollars, or any other sum, or at all, and denies that said San Francisco correspondent would have honored said alleged draft, if duly presented, or that it, in fact, at any time was honored or paid by said San Francisco correspondent of said Bank of Fruitvale to anyone.

Denies that said alleged draft was received by said Lyon County Bank on the 30th day of April, 1907, or at any other time, or at all.

### III.

(vi) Answering paragraph VI of said complaint defendant says that it has no information or belief upon the subject sufficient to enable it to answer the following:

“That on April 29, 1907, before the message hereinafter mentioned was delivered to said defendant for transmission, as hereinafter alleged, the plaintiffs were informed and believed that the stock of Kennedy Consolidated Gold Mining Company mentioned in said contract between plaintiffs and said Pitt and said Campbell was of little or no value, and, upon obtaining [23] such information, said plaintiffs determined to make no further payments on their said contract with said Pitt and said Campbell, and to abandon their rights in and to said stock under said contract, and to withdraw from their transaction with said Pitt and said Campbell.

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“That on the evening of April 29, 1907, for the purpose of intercepting said draft mailed to said Lyon County Bank before the same should be received or handled by said bank, or credited by it to the account of said Pitt and said Campbell and before said bank should have any dealings therewith, or should make any payment thereon, said plaintiffs called at said office of the defendant in Oakland, California, and stated to the agent in charge thereof, that they desired immediately to telegraph to the Lyon County Bank at Yerington, Nevada, a message in the words and figures following.”

And placing its denial on that ground denies that on the 29th day of April, 1907, or any other time, plaintiffs, or either of them, were informed and believed that the stock of the Kennedy Consolidated Gold Mining Company mentioned in said contract between the plaintiffs and said Pitt and said Campbell was of little or no value; and denies that plaintiffs at any time determined to make no further payment on their alleged contract with said Pitt and Campbell or to abandon their alleged rights in or to said stock, or to withdraw from their alleged transaction with said Pitt and said Campbell.

And denies that plaintiffs desired immediately to telegraph said message set forth in said complaint for the purpose of intercepting said draft, before the same should be received or handled by said bank or credited by it to the account of said Pitt and said Campbell, or either of them, or before said bank should have any dealings therewith, or should make any payment thereon.



Defendant admits that at said time the plaintiffs [24] stated to its agent that said message was urgent and that they desired to have the same delivered before banking hours on the following morning, and that the same related to the payment of a draft, and desired to know in what manner said plaintiffs could be absolutely assured that said message would be so delivered, but denies that plaintiffs at said time, or at all, stated to defendant, through its agent, that they had a contract for the purchase of certain shares of stock of a mining company, or that a payment under said contract was required to be made by them on or before the 1st day of May, 1907, or that in default thereof said contract to purchase such stock would by its terms be forfeited, and all the rights of the parties thereto would thereupon forever cease and determine. And denies that said plaintiffs stated to defendant through its agent, that for the purpose of making said payment they had mailed a draft for the sum of eleven thousand two hundred and fifty (11,250) dollars, payable to said Lyon County Bank, and payable to its order, or that said draft would in the ordinary course of the mail be delivered to said bank on the following morning, or that plaintiffs had, since mailing said draft, learned facts touching the value of said stock that had determined them to make no further payments under the said contract or to forfeit said contract and all moneys by them paid thereunder. Defendant admits that plaintiffs stated they were seeking by said message to intercept the payment of a certain draft referred to therein, but deny that said

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plaintiffs at said time, or at all, stated to defendant, through its agent, that plaintiffs were seeking by said message to intercept payment by said Bank on account of any contract to or with said Pitt and said Campbell, or said Pitt or said Campbell. And denies that plaintiffs then or there stated to said agent of defendant that unless said message was by said, defendant transmitted and delivered immediately to said bank at said town of Yerington before banking [25] hours on the following day, the said bank would receive said draft or would make payment of the amount thereof to said Pitt and said Campbell as alleged in said complaint, or that in any such event the said amount or any part thereof would be wholly lost to the plaintiffs, or that plaintiffs did not intend to continue under their said alleged contract, or that they had learned that the stock mentioned in said contract was of little or no value.

Defendant denies that defendant, through its agent, or otherwise, at said time mentioned in said complaint, or at all, represented to plaintiffs that it would insure the immediate delivery or the delivery at any time, of said message to said bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths (1.45) dollars in lawful money of the United States, or for any other sum, or at all.

Denies that plaintiff thereupon, or at all, accepted said alleged proposal of said defendant to transmit said message immediately or to insure its immediate delivery as alleged in said complaint, or otherwise.

and denies that then or there, or at all, plaintiffs paid to defendant the sum of one and forty-five hundredths (1.45) dollars, or any other sum, greater than the regular tolls on such messages, or that defendant accepted or received from plaintiffs said last mentioned sum, or that in consideration of the payment of the sum of one and forty-five hundredths (1.45) dollars, or of any other sum, other than the payment of the regular tolls thereon, defendant wrote the words "Deliver immediately" upon said message, or thereupon simultaneously, or at all, accepted said message for immediate transmission to the said town of Yerington or for immediate delivery to said bank; and denies that defendant agreed to immediately transmit or immediately deliver said message to said Lyon County Bank at said town of [26] Yerington. In this behalf defendant alleges that it stated to plaintiffs through its agent at said time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any time, to the town of Yerington and informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska and beyond that point the said message would have to be transmitted over a connecting telephone line and suggested to plaintiffs that in order to hasten delivery of said message they might write the words "Deliver immediately" upon the face of the same to be charged at the usual rate of tolls, but denies that it made any agreement whatever with

plaintiffs to insure the immediate transmission or delivery of said message under any terms whatever.

IV.

Defendant says that it has no information or belief upon the subject sufficient to enable it to answer the matters and things set forth and alleged in paragraph VII of said complaint and placing its denial on that ground,

(vii) Denies that if defendant had immediately or with reasonable promptness transmitted and delivered said message to said Lyon County Bank, it would have reached said bank at Yerington, Nevada, before said bank would have received said draft mailed to it as aforesaid; and denies that if said bank had received said message before receiving said draft, it would have returned or been authorized to return said draft to plaintiffs, or would not have placed the amount represented thereby to the credit of said Pitt or said Campbell, or either of them, or paid any amount thereon. Defendant admits that the said message was not delivered to or received by said Lyon County Bank until the second day of May, 1907; but denies that the delay in the transmission of said message was [27] caused by the gross negligence or any negligence of this defendant.

Answering the allegations in said complaint that before said 2d day of May, 1907, to wit, on the 30th day of April, 1907, said bank had received said draft mailed to it by plaintiffs, and had paid said Pitt and said Campbell the amount of said draft without any knowledge on the part of the said bank of the determination of said plaintiffs to withdraw from said

contract, and without any knowledge that plaintiffs did not desire to make any further payments under said contract, and without any knowledge of said message; or of the determination of said plaintiffs to recall said draft, defendant says that it has no information or belief on the subject sufficient to enable it to answer the same and placing its denial on that ground, denies that before the second day of May, 1907, to wit, on the 30th day of April, 1907, said bank had received said draft mailed to it by plaintiffs, or had paid said Pitt or said Campbell the amount of said draft, and denies that if said draft was so received and so paid as alleged in said complaint, that it was without any knowledge on the part of the said bank of any determination of plaintiffs to withdraw from said contract and denies that said payment if made was without any knowledge that plaintiffs did not desire to make any further payments under said contract, or of the determination of plaintiffs to recall said draft.

V.

Defendant says that it has no information or belief on the subject sufficient to enable it to answer the matters and things set forth in paragraph VIII of said complaint and placing its denial on that ground.

(viii) Denies that plaintiffs did not make any further payments on the said purchase price of said shares of stock [28] mentioned in said complaint, or that they abandoned said contract with said Pitt and said Campbell or forfeited or lost *and* and all moneys paid thereon.

## VI.

(x) Defendant denies that by reason of defendant's gross negligence, or any negligence, in failing to transmit or deliver said message immediately to said Lyon County Bank, plaintiffs suffered a loss in the sum of eleven thousand two hundred and fifty (11,250) dollars, or any other sum, or at all, but, on the contrary, on information and belief, alleges that the said stock of the Kennedy Consolidated Gold Mining Company described in said complaint was on the 30th day of April, 1907, is now and ever since has been, of greater value than said sum of seventy-five thousand (75,000) dollars.

## I.

And for a further and separate defense to said action the defendant avers that said message was received by it and transmitted by it over its wires subject to the terms printed on said message and subject to no other terms whatever, and that said terms were agreed to by the plaintiffs and among which said terms and agreements was the following:

**“ALL MESSAGES TAKEN BY THIS COMPANY  
ARE SUBJECT TO THE FOLLOWING  
TERMS:**

“To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-

delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender without liability, to forward any message over the lines of any other Company when necessary to reach its destination. [29]

"Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing."

## II.

And defendant avers that said message was not repeated, nor insured, nor was it ordered by plaintiffs or either of them to be repeated or insured as provided in said contract and said stipulation or agreement to guard against mistakes or delays in the transmission or delivery or the nondelivery of each message, and that said company does not and did not at said time insure the transmission or delivery of any message beyond the lines of said defendant company.



## III.

And for a further and separate defense to this action defendant avers that its lines of telegraph extends and did at said time alleged in said complaint, extend only as far as the town of Wabuska in the State of Nevada, and that in order for said message to reach its destination at Yerington, Nevada, it was necessary that the same be forwarded from said town of Wabuska to the town of Yerington over the telephone lines of the Yerington Electric Company, a corporation, which maintains and did at said time maintain a line of telephone between said town of Wabuska and said town of Yerington. That defendant did promptly upon the receipt of said message on the evening of April 29th, 1907, transmit the same correctly to the town of Wabuska in said State of Nevada and did promptly deliver the same to said Yerington Electric Company for further transmission over the telephone line of said last mentioned company to the town of Yerington, in accordance with the terms of said agreement and stipulation providing for the forwarding of any message over the lines of any other company when necessary to reach its destination. Defendant further avers [30] that if there was any delay in the transmission or delivery of said message that the same occurred upon the telephone lines of said Yerington Electric Company and not upon the lines of this defendant, and alleges that the delay complained of in the transmission and delivery of said message if the same occurred at all was not caused by this defendant or any agent thereof.



SECOND.

The defendant answers the second and separate cause of action set forth in said complaint as follows:

I.

Answering paragraphs I and III of the second cause of action, defendant refers to paragraphs numbers II, IV, V and VI hereinbefore set forth in this answer and makes the same a part of this answer to said second count or cause of action with the same force and effect as if repeated here at length.

II.

Answering paragraph II of the second and separate cause of action set forth in said complaint, this defendant refers to paragraph numbered III of this answer hereinbefore set forth and makes the same a part of this answer to said second paragraph of said second count of said complaint with the same force and effect as if repeated here at length.

Further answering said second paragraph of said second count of said complaint, defendant denies that plaintiffs before ordering said message to be sent, as set forth in said complaint, stated to defendant, that plaintiffs had entered into a contract with said Pitt and said Campbell, or said Pitt or said Campbell, named in said complaint, by which said plaintiffs were to purchase from them, or either of them, certain shares of stock in a mining corporation; or that said contract called for partial payments through the Lyon County Bank at Yerington, Nevada, or gave the plaintiffs the right to withdraw from said contract at any time [31] provided they forfeited the payments already made; or that plain-

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tiffs had already made one payment on said contract or that any payment thereon was required to be made by May 1, 1907; or that plaintiffs in order to provide for such latter payment had mailed from Oakland to the Lyon County Bank, at Yerington, Nevada, a draft for the sum of eleven thousand two hundred and fifty (11,250) dollars, or for any other sum; or that since mailing said draft the plaintiff had learned that said stock was practically worthless or that they desired to abandon said contract with said Pitt and said Campbell and to make no further payments thereon, or that the purpose of the proposed telegram was to save the sum of eleven thousand two hundred and fifty (11,250) dollars, which could be done provided the said telegram should reach said Lyon County Bank at Yerington the next morning before banking hours, or that otherwise the said sum would be lost to the plaintiffs; or that it was a matter of absolute necessity to have said telegram transmitted and delivered immediately.

Defendant admits that plaintiffs at said time asked defendant what could be done to make immediate transmission and delivery of said message absolutely certain, but denies that defendant informed them, or either of them, that by paying an amount in excess of the regular rates for such messages, the same could be insured, or stated that if the plaintiffs would pay the defendant the sum of one and forty-five hundredths (1.45) dollars, or any other sum, said message would be sent or delivered immediately, or that defendant would insure plaintiffs against all or any loss or damage that might be sustained, aris-

ing out of any failure on the part of defendant to immediately send or immediately deliver said message to Lyon County Bank; and denies that thereupon the plaintiffs paid the defendant the sum of one forty-five hundredths (1.45) dollars, or any other sum, for the immediate sending or the immediate delivery of said message or for [32] the insurance thereof as in the complaint stated, or at all, or that said message was received by said defendant under any agreement that it would immediately send or immediately deliver the same to said Lyon County Bank at Yerington, Nevada, or that it would insure plaintiffs against all or any loss or damage that they, or either of them, might sustain arising from any failure on the part of the defendant to immediately send or immediately deliver to said bank said message; and denies that the words "Deliver immediately" were endorsed by this defendant upon said message, for the purpose of evidencing such agreement, or for any other purpose, except as herein alleged. In this behalf defendant alleged that it stated to plaintiffs through its agent at said time that there was no way of insuring the immediate transmission or delivery of such message to the town of Yerington and informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, and beyond that point the said message would have to be transmitted over a connecting telephone line and suggested to plaintiffs that in order to hasten delivery of said message they might write the words "Deliver immediately" upon

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the face of the same to be charged at the usual rate of tolls, but denies that it made any agreement whatever with plaintiffs to insure the immediate transmission or delivery of said message under any terms whatever.

Defendant further alleged that said message was received by defendant written upon one of the regular blanks of the telegraph company containing the stipulations and agreements hereinbefore in this answer and in said second paragraph of said second count of said complaint specifically set forth, and was transmitted under said written agreement and that no other agreement of any kind or character was entered into between plaintiffs and this defendant, and no other sum was paid this defendant for the transmission of said message or received by it from plaintiffs, other than [33] the regular tolls chargeable for the transmission of such messages, and further alleges that no agreement of any character was made between plaintiffs and this defendant by which this defendant insured the immediate transmission or the immediate delivery of said message, and alleged that said words "Deliver immediately" were at the request of plaintiffs, endorsed upon said message by defendant and paid for at the regular rates of toll for the transmission of such messages.

And for a further and separate defense to said second and separate cause of action, defendant alleges that each and every allegation set forth in paragraphs I, II and III of the separate defense to the first cause of action hereinbefore set forth, are true and defendant refers to the same and makes the same

a part of this second defense of said second cause of action with the same force and effect as if repeated here at length.

WHEREFORE, defendant prays that plaintiffs takè nothing by this action and that it have judgment for its costs.

Dated April 22, 1910.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.

GEO. H. FEARONS,  
Of Counsel for Defendant.

State of California,  
City and County of San Francisco,—ss.

Frank Jaynes, being first duly sworn, upon oath deposes and says, that he is the general superintendent of the Western Union Telegraph Company, a corporation, and which is herewith appearing and filing its answer as defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are herein stated upon information or belief, and as to those matters he believes it to be true.

FRANK JAYNES. [34]

Subscribed and sworn to before me this 22d day of April, 1910.

[Seal]

N. E. W. SMITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

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Received copy of within answer this 22d of April,  
1910.

SAMUEL POORMAN, Jr.,  
FROHMAN & JACOBS,

Attys. for Plffs.

[Endorsed]: Filed Apr. 22, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[35]

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*In the District Court of the United States, Northern  
District of California, Second Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation, .

Defendant.

**Findings of Fact and Conclusions of Law.**

In this cause the parties having stipulated in writing that a jury be waived, the same was tried to the Court, and having been submitted, the Court now makes the following

**FINDINGS OF FACT.**

**I.**

That the plaintiffs are, and at the times of all of the matters herein mentioned were, citizens of the State of California and residents of the Northern District of California.

II.

That the defendant is, and at the times of all of the matters herein mentioned was, a *corporation organized and existing under the laws of the State of New York and a citizen of the State of New York.*

III.

That at all of said times said defendant was, and still is, a telegraph company, incorporated for the purposes, among other things, of carrying on, in and through the several states and territories of the United States of America, the business of receiving for transmission, transmitting by telegraph, forwarding and delivering messages, communications and dispatches for the general public for hire; and that at all of said times said defendant was conducting its said business in and through the States of California and Nevada, and was holding itself out to the general public as so doing, and was maintaining offices [36] throughout the States of California and Nevada for the receiving from the general public of messages, communications and dispatches to be so transmitted, forwarded and delivered. That at the times of all of the matters herein mentioned said defendant maintained an office for carrying on its said business at Number 1062 Broadway, in the city of Oakland, County of Alameda, State of California.

IV.

That on the 16th day of March, 1907, the plaintiffs entered into a contract in writing with one W. C. Pitt and one W. T. Campbell, which said contract is in the words and figures following, to wit:

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“This agreement, made this sixteenth day of March, A. D. 1907, by and between W. C. Pitt of the town of Lovelock, State of Nevada, and W. T. Campbell of the town of Yerington, State aforesaid, the parties of the first part, and J. U. Hastings of the town of Hayward, and William Lange, Jr., of the city of Oakland, State last named, the parties of the second part,

WITNESSETH:—That said parties of the first part agree to sell and deliver to said parties of the second part, and said parties of the second part agree to buy, take and receive from said parties of the first part, six hundred and twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, a corporation organized and existing under the laws of the territory of Arizona, upon the following terms and conditions, to wit:—

First: The total price or sum to be paid for the said shares of stock is seventy-five thousand dollars in gold coin of the United States of America, and the same shall be payable in the following manner, to wit: Seven thousand five hundred dollars upon the execution of this agreement; eleven thousand two hundred and fifty dollars on or before the first day of May, A. D. 1907; eleven thousand two hundred and fifty dollars on or before the fifth day of July, A. D. 1907; eleven thousand two hundred and fifty dollars on or before the fifth day of September, A. D. 1907; eleven thousand two hundred and fifty dollars on or before the fifth day of November, A. D. 1907; eleven thousand two hundred and fifty dollars on or before the fifth day of January, A. D. 1908; and



eleven thousand two hundred and fifty dollars on or before the fifth day of March, A. D. 1908.

Second: It is hereby agreed by the said parties of the first part that immediately upon the payment of said first named sum, they will deposit in escrow in and with the Lyon County Bank, of the town of Yerington, State of Nevada, certificates of stock standing in the names of either or both of them, endorsed in blank by the person or persons in whose names such certificates respectively stand, and representing in the aggregate said six hundred and [37] twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, and will thereupon enter into an escrow agreement with said parties of the second part and said Lyon County Bank, under which said agreement said Lyon County Bank shall hold said shares of stock deposited with it as aforesaid, to be delivered to said parties of the second part immediately upon the payment by said parties of the second part of the final payment herein provided for. And said Lyon County Bank is hereby constituted the agent of said parties of the first part for the purpose of receiving any and all payments to be made hereunder and for the purpose of giving all necessary acquittances for the sums payable under the terms hereof.

Third: And it is further agreed that in the event of default by said parties of the second part in making any of the payments herein provided for, said Lyon County Bank shall be authorized under the terms of such deposit in escrow, and it is hereby authorized, to deliver all of the shares of stock so

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deposited with it pursuant hereto to said parties of the first part, and that all payments theretofore made by said parties of the second part shall be forfeited to said parties of the first part, and that thereupon all rights of each of the said parties hereunder shall forever cease and determine.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year first above written.

W. C. PITT. (Seal)

W. T. CAMPBELL. (Seal)

J. U. HASTINGS. (Seal)

By SAMUEL POORMAN, Jr.,

His Attorney in Fact.

WILLIAM LANGE, Jr. (Seal)

By SAMUEL POORMAN, Jr.,

His Attorney in Fact."

V.

That upon the execution of said contract last hereinbefore mentioned, the plaintiffs paid to the said Pitt and the said Campbell, in conformity to the terms thereof, the initial sum or installment of \$7,500 in said contract provided for; that thereupon the said Pitt and the said Campbell, pursuant to the terms of said contract, deposited in escrow with Lyon County Bank therein mentioned, at Yerington, Nevada, certificates representing said 625,000 shares of the capital stock of said Kennedy Consolidated Gold Mining Company, a corporation, properly endorsed, and that thereupon said Lyon County Bank received said certificates of stock in escrow and held the same in accordance with said contract [38]

and subject to such disposition as was required by said contract on the happening of any of the contingencies therein provided for.

VI.

That on the same day, but after the execution of said contract, plaintiffs arranged with said Lyon County Bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of such drafts in gold coin to said Pitt and said Campbell for plaintiffs pursuant to the terms of said contract between plaintiffs and said Pitt and said Campbell and on account of the payments to be made thereunder.

VII.

That for the purpose of making the payment mentioned in said contract between the plaintiffs and said Pitt and said Campbell, which, by the terms of said contract, had to be made on or before the 1st day of May, 1907, said plaintiffs, on the 27th day of April, sent by United States mail from said City of Oakland, California, to said Lyon County Bank at Yerington, Nevada, a draft drawn by the Bank of Fruitvale on its San Francisco correspondent, for the sum of eleven thousand two hundred and fifty dollars, United States gold coin, payable to the order of said Lyon County Bank. That the plaintiffs paid for said draft the sum of eleven thousand two hundred and fifty dollars in such gold coin. That said Bank of Fruitvale then had sufficient credit with its said San Francisco correspondent so that said draft was worth eleven thousand two hundred and fifty

dollars, gold coin, and would have been honored by it for said amount when duly presented, and was in fact afterwards honored, and the sum of eleven thousand two hundred and fifty dollars, gold coin, was actually paid thereon by the drawee thereof.

[39] That said draft was received by said Lyon County Bank at Yerington, Nevada, on the 30th day of April, 1907, at some time between the hour at which said bank had opened for business on that day, to wit, 8:30 o'clock A. M., and the hour of 9:00 o'clock A. M. of that day.

#### VIII.

That on April 29th, 1907, before the message hereinafter mentioned was delivered to said defendant for transmission, as hereinafter set forth, the plaintiffs were informed and believed that the stock of Kennedy Consolidated Gold Mining Company mentioned in said contract between plaintiffs and said Pitt and said Campbell was of little or no value, and, upon obtaining such information, said plaintiffs determined to make no further payments on their said contract with said Pitt and said Campbell, and to abandon their rights in and to said stock under said contract and to withdraw from their transaction with said Pitt and said Campbell. That on the evening of April 29th, 1907, for the purpose of intercepting said draft mailed to said Lyon County Bank before the same should be received or handled by said bank, or the amount thereof credited by it to the account of said Pitt and said Campbell, and before said bank should have any dealings therewith or should make any payment thereon, said plaintiffs called at said

office of the defendant in Oakland, California, and stated to the agent in charge thereof that they desired immediately to telegraph to the Lyon County Bank at Yerington, Nevada, a message in the words and figures following, to wit:

“Oakland, April 29, 1907.

Lyon County Bank,  
Yerington, Nevada.

Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS and LANGE.” [40]

That plaintiffs, at the same time, stated to said defendant, through its said agent, that it was absolutely necessary that said message be delivered to said bank therein named before banking hours on the following morning, that is to say, before said bank should open for business on the 30th day of April, 1907, and desired to know of said agent in what manner the said plaintiffs could be absolutely assured that said message would be so delivered. Plaintiffs, at the same time, stated to said defendant, through its said agent, that they had a contract for the purchase of certain shares of stock of a mining company, and that a payment under said contract was required to be made by them on or before the 1st day of May, 1907, to said Pitt and said Campbell, in said message mentioned, through said Lyon County Bank, or that in default thereof said contract to purchase such stock would by its terms be forfeited and all rights of all parties thereto would thereupon forever cease and determine. That for

the purpose of making said payment they had mailed from Oakland to said Lyon County Bank at said town of Yerington a certain bank draft in the sum of eleven thousand two hundred and fifty dollars, gold coin of the United States, payable to the order of said Lyon County Bank; that said draft would, in the ordinary course of the mail between said city of Oakland and said town of Yerington, be delivered to said bank on the following morning, that is to say, during the forenoon of April 30th, 1907; that plaintiffs had, since mailing said draft as aforesaid, learned facts touching the value of said stock that had determined them to make no further payments under said contract and to forfeit said contract and all moneys by them already paid thereunder; that plaintiffs were seeking, by the message then offered by them to defendant for transmission and delivery to said Lyon County Bank, as aforesaid, to intercept payment by [41] said bank on account of said contract to said Pitt and said Campbell, in said message mentioned, of the amount of the face of said draft, to wit, eleven thousand two hundred and fifty dollars, as they were lawfully entitled to do. And it was then and there further stated by said plaintiffs to said agent of defendant that unless said message was by said defendant transmitted and delivered immediately to said bank at said town of Yerington before banking hours of the following day, to wit, April 30th, 1907, said bank would receive said draft and would make payment of the amount thereof to said Pitt and said Campbell, as aforesaid, in which event said amount would be wholly lost to

these plaintiffs, as they did not intend to continue under their contract, having learned that the stock mentioned in said contract and on account of the purchase of which said draft had been mailed, as aforesaid, was of little or no value. That thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would insure the immediate delivery of said message to said bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington—defendant's said regular charges being the aggregate sum of its own tolls for the transmission of such a message from Oakland to Wabuska, plus the tolls of Yerington Electric Company for the transmission of such a message from Wabuska to Yerington. That plaintiffs thereupon accepted said proposal of said defendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said message in writing and paid the sum of one and forty-five hundredths dollars to said defendant, through its said agent, and defendant [42] then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent, wrote upon said message and immediately below the date thereof, the words "Deliver immediately," and simultaneously therewith accepted said message for



immediate transmission to said town of Yerington and for immediate delivery to said Lyon County Bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs, and insured to plaintiffs such immediate transmission and such immediate delivery thereof, as aforesaid.

## IX.

That it is not true that defendant stated to plaintiffs at any time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any definite time, to the town of Yerington, That it is not true that defendant informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, or that beyond that point the said message would have to be transmitted over a connecting telephone line. That it is not true that defendant suggested to plaintiffs at any time that in order to hasten delivery of said message plaintiffs might write the words "Deliver immediately" upon the face of the same, to be charged for at the usual rate of tolls. That it is not true that defendant did not, at the time said message was offered to, and accepted by, it for transmission and delivery, as aforesaid, inform plaintiffs that it could not insure the transmission or delivery of any message beyond the lines of said defendant.

## X.

That the said sum of one and forty-five hundredths dollars so paid to defendant for said message, was in excess of the defendant's regular and usual tolls for



the transmission and delivery of [43] the same as an unrepeatd message, the usual toll therefor being ninety-eight cents. That the total charge for transmitting such a message as that herein referred to, from Oakland, California, to Yerington, Nevada, over the telegraph lines of defendant and over the telephone line of Yerington Electric Company herein-after mentioned, as a "repeated message," was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the Court finds that the said sum of one and forty-five hundredths dollars, by plaintiffs paid to defendant, was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank.

XI.

That said message last hereinbefore referred to was written on a blank form of the defendant containing on its face the following printed matter, to wit:

"Form No. 260.

THE WESTERN UNION TELEGRAPH  
COMPANY.

Incorporated.

23,000 Offices in America.

Cable Service to All the World.

ROBERT C. CLOWRY,

President and General Manager.

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Receiver's No.                      Time Filed.                      Check.

Send the following message subject to the terms on back hereof, which are hereby agreed to:

Read the notice and agreement on back."

That on the back of said blank form the following printed matter appeared, to wit:

**"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:**

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. [44] For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery of any unrepeatd message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

Correctness in the transmission of a message to any point on the lines of this Company can be insured by contract in writing, stating agreed amount

of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent, for any distance not exceeding 1,000 miles, and two per cent, for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's Messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

ROBERT C. CLOWRY,

President and General Manager."

That said blank form was one furnished by defendant at its said office for the use of all persons desiring to send telegrams, and plaintiffs did not, nor did either of them, read the printed matter on said blank, and plaintiffs were not, nor was either of them, cognizant of the terms and conditions printed thereon, nor did the defendant or its agent call the attention of the plaintiffs, or either of them, to said terms or conditions, or to any of them.

## XII.

That said message was not repeated by defendant in the manner provided in the stipulations on said message blank, or at [45] all, although plaintiffs directed said message to be transmitted by defendant in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs the immediate transmission and the immediate delivery thereof to said Lyon County Bank, and that defendant accepted said message for such immediate transmission and immediate delivery thereof, and insured to plaintiffs the immediate transmission and immediate delivery of the same as directed.

## XIII.

That in the months of April and May, 1907, the regular course of communication by telegraph between Oakland, California, and Yerington, Nevada, was by the lines of telegraph of the Western Union Telegraph Company, defendant in this action, from Oakland to Wabuska, in the State of Nevada, which was the terminus of the Western Union Telegraph Company's lines for Yerington messages, and thence by telephone over the line of the Yerington Electric Company to Yerington; that the Yerington Electric Company at said time operated the only telephonic or telegraphic line or means of such communication between Wabuska and Yerington, and in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska it was necessary that it be forwarded from that point over the line of the Yering-

ton Electric Company to Yerington. That in the months of April and May, 1907, each of said companies received all messages offered it by the other Company for further transmission, subject to the stipulations on telegraphic blanks, so far as valid and applicable, each company having and charging therefor its own separate tolls. That in April and May, 1907, Yerington Electric Company's Wabuska office and Western Union Telegraph Company's Wabuska office were both maintained in the Southern Pacific Railroad Company's station at Wabuska, and that the telephone instrument of Yerington [46] Electric Company in said office was within a few feet of the telegraphic instruments of the Western Union Telegraph Company in said office. That at said time the Southern Pacific Railroad Company employed an agent at Wabuska, Nevada, to attend to its railroad business. That by an arrangement and agreement between said Railroad Company and the Western Union Telegraph Company, the said agent was at said time employed to handle the telegraph business of the Western Union Telegraph Company at Wabuska, that is, to receive all telegraph messages transmitted to that point over the lines of telegraph of said Western Union Telegraph Company and to transmit over said telegraph line all telegraph messages received by him for such transmission thereover; and by an arrangement and agreement between said Railroad Company and the said Yerington Electric Company the said agent of said Railroad Company was at the same time employed to handle the telephone business of said Yerington Electric Com-

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pany at Wabuska, that is, to receive all messages transmitted to Wabuska over the lines of telephone of the said Yerington Electric Company, and to transmit from said point and over said telephone line of said Yerington Electric Company all messages received by him for transmission thereover.

XIV.

That there was a regular stage line operated between Yerington and Wabuska in April and May, 1907. That the distance between Yerington and Wabuska is approximately eleven miles, and could be traversed in the stage in about one and one-half hours.

XV.

That defendant did not promptly, upon receipt of said message on the evening of April 29th, 1907, transmit the same to the town of Wabuska, in said State of Nevada. That defendant did not promptly deliver said message to said [47] Yerington Electric Company for further transmission over the telephone line of said last-named company to the town of Yerington. That, on the contrary, defendant wholly failed and neglected to transmit said message to said Wabuska until May 2d, 1907, and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2d, 1907. That such failure and neglect of said defendant and the delay in the receipt of said message by said Lyon County Bank, as herein found, occurred wholly on the lines of telegraph of said defendant and was caused by defendant, and did not at all occur upon the lines of telephone of said Yerington Electric Com-

pany and was not caused by said last-named Company.

## XVI.

That if said defendant had immediately or with reasonable promptness transmitted and delivered said message to said Lyon County Bank, said message would have reached said bank at Yerington, Nevada, before said bank had received said draft mailed to it as aforesaid; and that if said bank had received said message before receiving said draft, it would not have placed the amount represented thereby to the credit of said Pitt and said Campbell, or either of them, or paid any amount thereon; but that defendant, with what the Court finds to be gross negligence, delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the 2d day of May, 1907. That before said 2d day of May, 1907, to wit, on the 30th day of April, 1907, between the hours of 8:30 o'clock A. M. and 9:00 o'clock A. M. of that day, said bank had received said draft, and thereafter on that day said bank pursuant to its arrangement with plaintiffs, treating said draft as gold coin, had paid over the amount thereof in gold coin to said Pitt and said Campbell, pursuant to the terms of said contract between plaintiffs and said [48] Pitt and said Campbell and on account of the payment thereunder to be made on or before May 1st, 1907, and had thereupon given credit to plaintiffs for said amount so paid upon said contract. That said bank then forwarded said draft to the drawee thereof for payment, and in due course said draft was



honored and paid. That all of the matters and things in this paragraph found to have been done by said Lyon County Bank were by it done without any knowledge on its part of plaintiffs' determination to withdraw from said contract, and without any knowledge by it that plaintiffs did not desire to make any further payment under said contract, and without any knowledge by it of said message or of the determination of said plaintiffs to recall said draft or to direct said bank to make no payment to said Pitt and said Campbell or either of them.

## XVII.

That plaintiffs did not make any further payments on the purchase price of said shares of stock hereinbefore mentioned, but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon.

## XVIII.

That said 625,000 shares of the capital stock of Kennedy Consolidated Gold Mining Company, hereinbefore mentioned, have been, at all times since and including the 29th day of April, 1907, practically valueless.

## XIX.

That thereafter, to wit, on the 26th day of June, 1907, plaintiffs presented to said defendant their written claim against said defendant for damages suffered by plaintiffs by reason of the facts hereinbefore set forth, in which said claim there was set forth in writing in full, true and correct statement of all of the facts and circumstances out of which said claim arose, as herein more particularly set



forth and found, and plaintiffs therein claimed of and from said defendant [49] the amount of their said damages, to wit, the sum of eleven thousand two hundred and fifty dollars.

XX.

That by reason of defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon County Bank, plaintiffs suffered damage and loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty dollars; and that neither the whole nor any part thereof has been paid to plaintiffs, or to either of them, or at all.

CONCLUSION OF LAW.

As its conclusion of law from the foregoing facts, the Court finds that the plaintiffs are entitled to judgment against the defendant for the sum of \$11,250, gold coin of the United States, together with their costs of suit.

Let judgment be entered accordingly.

Dated this 15th day of November, 1916.

WM. C. VAN FLEET,

U. S. District Judge.

[Endorsed]: Filed Nov. 15, 1916. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [50]

*In the Southern Division of the United States District Court for the Northern District of California, Second Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Judgment on Findings.**

This cause having come on regularly for trial upon the 1st day of April, A. D. 1915, before the Court sitting without a jury, a trial by jury having been specially waived by written stipulation filed, Samuel Poorman, Jr., Esq., appearing as attorney for plaintiffs, and Beverly L. Hodghead, Esq., and Frank D. Stringham, Esq., appearing as attorneys for defendant, and the trial having been proceeded with on the 2d day of April, in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and the evidence having been closed, and the cause having been submitted to the Court for consideration and decision; and the Court, after due deliberation, having filed its findings in writing and ordered that judgment be entered herein in accordance with said findings and for costs:

Now, therefore, by virtue of the law and by reason

of the findings aforesaid, it is considered by the Court that William Lange, Jr., and J. U. Hastings, plaintiffs, do have and recover of and from Western Union Telegraph Company, a corporation, defendant, the sum of eleven thousand two hundred fifty and no/100 (\$11,250) dollars, together with their costs herein expended taxed at \$29.80.

Judgment entered November 15, 1916.

WALTER B. MALING,

Clerk.

A true copy.

[Seal]

Attest: WALTER B. MALING,

Clerk.

[Endorsed]: Filed Nov. 15, 1916. Walter B. Maling, Clerk. [51]

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*In the District Court of the United States, for the Northern District of California, Second Division.*

No. 14,885.

Before Hon. WILLIAM C. VAN FLEET, Judge.  
WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant.

**Bill of Exceptions.**

Be it remembered that on the 1st day of April, 1915, the above-entitled cause came on regularly for

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trial before Honorable WILLIAM C. VAN FLEET, Judge of said court, a jury having been duly waived by all the parties hereto by stipulation in writing filed in said cause and attached hereto. The plaintiffs appeared by Samuel Poorman, Jr., Esq., their counsel, and the defendant by Beverly L. Hodghead, Esq., its counsel; whereupon the following proceedings were had.

Mr. POORMAN.—If your Honor please, this is an action wherein the plaintiffs seek to recover from the defendant damages arising out of the delay in transmission and delivery of a telegraph message sent from Oakland, California, to Yerington, Nevada, the purpose of which was to intercept the payment of a draft which had been previously sent from Oakland by these plaintiffs to the Lyon County Bank in the sum of \$11,250. The message in question, according to the allegations of the complaint, was delivered to defendant's office on Broadway in Oakland, at about 8:30 P. M. on the 29th of April, 1907. The acceptance of the message is admitted by the answer. The transmission, so far as the exact agreement with [52] regard to its transmission, is disputed.

The complaint further alleges that in the ordinary course of mail the draft would have reached the Lyon County Bank the following morning, and in order to be of any avail the message had to reach the bank before the draft was converted into money and payment made to Pitt and Campbell as was expected by plaintiffs in sending the draft. I will explain that the payment was the second of certain

installment payments that were to become due at intervals of 60 days on a contract between the plaintiffs and Pitt and Campbell for the purchase of some 625,000 shares of stock in the Kennedy Consolidated Gold Mining Company. The stock was deposited in escrow with the Lyon County Bank under the terms of the agreement and the bank was authorized to accept payment in gold coin of the different installments as they came due and to give acquittances to plaintiffs in that behalf.

The contract further alleges that they were constituted the agents of Pitt and Campbell for the purpose of accepting payment under that agreement. There was no formal written escrow instruction but the transaction amounted to this: A deposit of the copy of the agreement with Pitt and Campbell and instructions to see that the terms of that agreement were carried out. The plaintiff made the initial payment of \$7,500 under the contract with Pitt and Campbell; when the next payment was about to become due they forwarded the draft that has been mentioned already to the Lyon County Bank for the purpose of making the second payment. It was after securing information which they deemed sufficient to act upon, on the 29th of April, 1907, that they sought to employ the facilities of the defendant in sending the message in dispute, the message in litigation, to the Lyon County Bank for the purpose of stopping their further dealings with that draft, as they maintain they had a right to do.

The facts for the most part are admitted. There are [53] certain denials in the pleadings which

have since been gotten around by stipulation with respect to the facts. So that the issues at the present time presented to the Court are these, I think,—and counsel will correct me if there are any others: the making of the Pitt and Campbell contract; the exact time of the arrival of the registered letter in which the draft was sent to the Lyon County Bank. The fact that the stock was deposited in escrow pursuant to the agreement is admitted. The dealing by the bank with the draft on the 30th of April, 1907, is also admitted.

The COURT.—You mean in accordance with the instructions?

Mr. POORMAN.—In accordance with what will come out in the course of the testimony because that is left open to explanation.

The COURT.—I mean in accordance with the instructions conveyed in the letter transmitting the draft?

Mr. POORMAN.—Yes, I presume in accordance with those instructions and of a prior understanding with the plaintiffs.

I think there are no disputes in connection with the matter further than the exact nature of the negotiations between the plaintiffs and the defendant at the time they employed the defendant to send the message to Yerington and also possibly the explanation that is necessary with respect to the way in which the bank dealt with the draft, and was authorized to deal with the draft, and also the moment at which the bank received the draft—if that is material.

Plaintiff then read in evidence a stipulation as to agreed facts entered into by the respective parties to said cause on the 29th day of March, 1915, which stipulation of facts is as follows:

(Title of Court and Cause.)

**"STIPULATION AS TO AGREED FACTS.**

It is hereby stipulated and agreed by the respective parties hereto in the above-entitled action, that the statements [54] and facts hereinafter set forth are true and that upon the trial of said action but subject in each case to all legal objections which either party may desire to interpose thereto, the said facts will be admitted and taken to be true, as set forth herein, without proof thereof other or further than this stipulation and agreement and admission herein contained. The statements and facts in this stipulation and agreement referred to are the following:

1st: That in the months of April and May, 1907, the regular course of communication by telegraph between Oakland, California, and Yerington, Nevada, was by the lines of telegraph of the Western Union Telegraph Company, defendant in this action, from Oakland to Wabuska in the State of Nevada, which was the terminus of the Western Union Telegraph Company's lines for Yerington messages, and thence by telephone over the line of the Yerington Electric Company to Yerington; that the Yerington Electric Company at said time operated the only telephonic or telegraphic line or means of such communication between Wabuska

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and Yerington, and in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from that point over the line of the Yerington Electric Company to Yerington.

2d: That in the months of April and May, 1907, each of said companies received all messages offered it by the other company for further transmission, subject to the stipulations on telegraphic blanks, so far as valid and applicable, each company having and charging therefor its own separate tolls.

3d: That there was a regular stage line operated between Yerington and Wabuska in April and May, 1907.

4th: That the distance between Yerington and Wabuska is approximately eleven miles and could be traversed in the [55] stage in about one and one-half hours.

5th: That Lyon County Bank in April and May, 1907, had its only place of business in Yerington, Nevada, and said Bank had no other place of business or address.

6th: That all telephonic messages from Lyon County Bank, or signed Lyon County Bank, received at the Yerington office of Yerington Electric Company, originated at Yerington.

7th: That the message of April 29th, 1907, from Hastings and Lange to Lyon County Bank was transmitted twice over Yerington Electric Company's line from Wabuska to Yerington on May 2d, 1907,—that is to say, the message was sent and was followed by a confirmation of the same message, but this ad-



mission is not intended to preclude proof of the earlier transmission of same to Yerington.

8th: That in April and May, 1907, Yerington Electric Company's Wabuska office and Western Union Telegraph Company's Wabuska office were both maintained in the Southern Pacific Railroad Company's station at Wabuska and that the telephone instrument of Yerington Electric Company in said office was within a few feet of the telegraphic instruments of the Western Union Company in said office. That at said time the Southern Pacific Railroad Company employed an agent at Wabuska, Nevada, to attend to its railroad business. That by an arrangement and agreement between said railroad company and the Western Union Telegraph Company, the said agent was at said time employed to handle the telegraph business of the Western Union Telegraph Company at Wabuska, that is to receive all telegraph messages transmitted to that point over the lines of telegraph of said Western Union Telegraph Company and to transmit over said telegraph line all telegraph messages received by him for such transmission thereover; and by an arrangement and agreement between the said railroad [56] company and the said Yerington Electric Company the said agent of said railroad company was at said time employed to handle the telephone business of said Yerington Electric Company at Wabuska, that is to receive all messages transmitted to Wabuska over the lines of telephone of the said Yerington Electric Company and to transmit from

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said point and over said telephone line of said Yerington Electric Company all messages received by him for transmission thereover.

9th: That on April 30th, 1907, and after the bank draft referred to in plaintiff's complaint was received by the Lyon County Bank, said bank, as was intended by the plaintiffs in forwarding the same, treated said bank draft as gold coin, as explained by the evidence in the cause, and gave credit for the amount thereof to plaintiffs herein upon the escrow agreement referred to in the complaint and issued to Pitt and Campbell, each, a certificate of deposit on said Lyon County Bank for one-half of said amount. Said bank then forwarded said draft to the maker thereof for payment, and in due course said draft was honored and paid.

It is stipulated that either party hereto may use any portion of the deposition of witnesses George F. Willis or of E. H. Whitacre, filed herein, either on direct or cross-examination the same as if said testimony had been taken at the instance of the party so using the same, subject, however, to all legal objections.

It is stipulated that the original message, filed with defendant in Oakland, was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 P. M., April 29th, 1907.

It is further stipulated that the shares of stock [57] referred to in said escrow agreement were deposited with the Lyon County Bank at the time said agreement was made, and were properly endorsed.

Dated this 29th day of March, 1915.

SAMUEL POORMAN, Jr.,  
Attorney for Plaintiffs.

BEVERLY L. HODGHEAD,  
Attorney for Defendant."

The COURT.—Referring to paragraph VIII, the agent mentioned there was the agent of the defendant there as well as the agent of the Yerington Electric Company?

Mr. POORMAN.—The common agent, yes, your Honor, and occupying the one office, for both companies.

Mr. HODGHEAD.—I will just simply state that the defense, generally, in this matter is that the message which failed, failed upon the connecting line and for which the defendant is not responsible. The message was delivered either at Yerington or at Wabuska, and if at Wabuska it failed after it had been delivered into the possession of the joint agent and in his duty as agent of the connecting line, so the delay occurred upon a connecting line.

The COURT.—Wasn't that your agent?

Mr. HODGHEAD.—Not at the time it failed. The telegraph company discharged its whole duty in this case.

The COURT.—I thought the stipulation was that he was your mutual agent?

Mr. HODGHEAD.—No, he was not a mutual agent in the sense that he would be a joint tortfeasor. This was a very small agency and one man could attend to the duties of the railroad as well as to the other duties. When this delay occurred it was

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off of the Western Union line and the telegraph company had discharged its full duty and there was no negligence by the telegraph company.

The second defense is that this was an unrepeatable message [58] and is controlled by the blank, which has received certain interpretations and constructions by the courts.

This contract or escrow agreement which is the basis of this claim was an absolute agreement. That matter has been presented upon demurrer, but the contract itself was not attached to the pleadings, and we claim that the decision in that matter is not binding because of the difference between the contract itself as it will be presented here and the pleading that was then before the court.

When we come to interpret the contract, the obligation of the plaintiff here to purchase the property was not an option, but it was an absolute agreement, if they were obligated to buy, it would not make any difference how many messages failed. If, however, the Court should construe that that contract was not absolute, but was an option, then that was a continuing option open to them and was accepted, and that acceptance was final and complete when this draft was mailed, and the transaction was complete and the bank had no right to return the draft, even though they received the telegram prior to the receipt of the draft; that right became vested at that time, and it became a payment on that agreement, as was intended by the letters of instruction; in other words, payment could not be revoked.

The COURT.—I do not think that would be true if the bank was merely acting as an intermediary, an agent of both parties.

Mr. HODGHEAD.—We contend there was no damage. Of course, that matter will be developed by the evidence.

**Testimony of William Lange, Jr., in His Own Behalf.**

WILLIAM LANGE, Jr., one of the plaintiffs in said cause, was thereupon called as a witness for plaintiffs, and being first duly sworn, testified as follows:

The WITNESS.—I am one of the plaintiffs in this action. I reside in Oakland, California, and am in the business of producing [59] oil. The message now shown to me, dated April 29, 1907, addressed to the Lyon County Bank, Yerington, Nevada, is the original message offered by me to the Western Union Telegraph Company for transmission at its office on Broadway between Eleventh and Twelfth Streets in Oakland. It was so offered about 8:30 o'clock in the evening of that day for the purpose of stopping the payment of a draft that was sent to our agent, the Lyon County Bank at Yerington, on April 27th. The draft had been sent by registered letter addressed to the Lyon County Bank, Yerington, Nevada. It was drawn for \$11,250, the amount we paid for it, and made payable to the Lyon County Bank. It was procured from the bank of Fruitvale and drawn on the First National Bank of San Francisco. The reason we wired that the draft had been mailed under mistake was that on

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(Testimony of William Lange, Jr.)

April 29th in the afternoon I met Messrs. Ruddock and W. S. Bliss, mining engineers, who had been to Nevada to examine the Buckskin properties, meaning the Kennedy Consolidated Mining Company's properties. We had sent them there to make this examination. They asked me whether I had made the second payment on the Kennedy stock or mailed a draft for it and I told them I had. Mr. Ruddock informed me that I should not have done it and I should try to recall the draft because the mine was not any good and did not show up anything.

The instrument now shown me, dated March 16, 1907, is an agreement between Pitt and Campbell, the parties of the first part, and Hastings and Lange, the parties of the second part. We entered into this writing and I recognize the signatures thereto, which are the signatures of J. U. Hastings, William Lange, Jr., W. S. Pitt and W. T. Campbell. The names of J. U. Hastings and William Lange, Jr. were signed by Samuel Poorman, Jr., our attorney in fact.

The instrument now shown me I recognize is the power of attorney executed by J. U. Hastings and myself to Samuel Poorman, Jr., and delivered to him on the day of its date. It was made so he [60] could *not* act as our attorney in fact in closing up this matter in Nevada, that is in executing the contract and any other arrangements.

Said instruments were offered and admitted and read in evidence and marked, respectively, Plaintiffs' Exhibits 1 and 2, and read as follows:

**Plaintiffs' Exhibit No. 1—Contract Dated March 16, 1907, Between W. C. Pitt et al. and J. U. Hastings et al.**

“THIS AGREEMENT, made this sixteenth day of March, A. D. 1907, by and between W. C. Pitt of the town of Lovelock, State of Nevada, and W. T. Campbell of the town of Yerington, State aforesaid, the parties of the first part, and J. U. Hastings of the town of Hayward, State of California, and William Lange, Jr., of the City of Oakland, State last named, the parties of the second part,

WITNESSETH: That said parties of the first part agree to sell and deliver to said parties of the second part, and said parties of the second part agree to buy, take and receive from said parties of the first part, six hundred and twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, a corporation organized and existing under the laws of the Territory of Arizona, upon the following terms and conditions, to wit:

FIRST: The total price or sum to be paid for the said shares of stock is seventy-five thousand dollars in gold coin of the United States of America, and the same shall be payable in the following manner, to wit: Seven thousand five hundred dollars upon the execution of this agreement; Eleven thousand two hundred and fifty dollars on or before the first day of May, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of July, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before

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the fifth day of September, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of November, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of January, A. D. 1908; and Eleven thousand two hundred and fifty dollars on or before the fifth day of March, A. D. 1908. [61]

SECOND: It is hereby agreed by the said parties of the first part that immediately upon the payment of said first-named sum, they will deposit in escrow in and with the Lyon County Bank, of the town of Yerington, State of Nevada, certificates of stock standing in the names of either or both of them, endorsed in blank by the person or persons in whose names such certificates respectively stand, and representing in the aggregate said six hundred and twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, and will thereupon enter into an escrow agreement with said parties of the second part and said Lyon County Bank, under which said agreement said Lyon County Bank shall hold said shares of stock deposited with it as aforesaid, to be delivered to said parties of the second part immediately upon the payment by said parties of the second part of the final payment herein provided for. And said Lyon County Bank is hereby constituted the agent of said parties of the first part for the purpose of receiving any and all payments to be made hereunder and for the purpose of giving all necessary acquittances for the sums payable under the terms hereof.



**THIRD:** And it is further agreed that in the event of default by said parties of the second part in making any of the payments herein provided for, said Lyon County Bank shall be authorized under the terms of such deposit in escrow, and it is hereby authorized, to deliver all of the shares of stock so deposited with it pursuant hereto to said parties of the first part, and that all payments theretofore made by said parties of the second part shall be forfeited to said parties of the first part, and that thereupon all rights of each of the said parties hereunder shall forever cease and determine. [62]

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year first above written.

W. C. PITT. (Seal)

W. T. CAMPBELL. (Seal)

J. U. HASTINGS. (Seal)

By SAMUEL POORMAN, Jr.,

His Attorney in Fact.

WILLIAM LANGE, Jr.,

By SAMUEL POORMAN, Jr.,

His Attorney in Fact.

**Plaintiffs' Exhibit No. 2—Power of Attorney from  
J. U. Hastings et al. to Samuel Poorman, Jr.**

**“KNOW ALL MEN BY THESE PRESENTS:**

That we, J. U. Hastings of the Town of Haywards, County of Alameda, State of California, and William Lange, Jr., of the City of Oakland, County and State aforesaid, have made, constituted and appointed, and by these presents do make, constitute

and appoint Samuel Poorman, Jr., of the City of Alameda, County and State aforesaid, our true and lawful Attorney for us and in our names, place, and stead, and for our use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, demands, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to us, and have, use and take all lawful ways and means in our names or otherwise for the recovery thereof, by attachments, arrests, distress or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for us, and in our names, to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments and accept the seisin and possession of all lands, and all deeds and other assurances, in the law therefor, and to lease, let, demise, bargain, sell, remise, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions, and under such [63] covenants, as he shall think fit. Also, to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, the capital stock of any and all private corporations, evidences of indebtedness, choses in action and other property in possession or in action, and to make, do and transact all and every kind of business of what nature or kind soever, and also for us and in our names, and as our act

(Testimony of William Lange, Jr.)

and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgments and other debts and such instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and granting unto our said attorney full power and authority to do and perform every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that our said attorney, or his substitute or substitutes, shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, we have hereunto set our respective hands and seals this 21st day of February, A. D. 1907.

(Signed) J. U. HASTINGS. (Seal)

WM. LANGE, Jr. (Seal)"

(Duly acknowledged by said J. U. Hastings and by said Wm. Lange, Jr., before a Notary Public under his seal attached thereto.) [64]

WITNESS.—(Continuing.) When I received the information from Messrs. Ruddock and Bliss, I immediately consulted counsel and then called up Mr. Hastings on the telephone at Haywards,

(Testimony of William Lange, Jr.)

California, and asked him to come to Oakland. Mr. Ruddock had informed me that the only way to send a message was to insure the message, referring to the message about intercepting the draft. Mr. Hastings could not get to Oakland before eight o'clock that night. He arrived about that time. We talked the matter over and went to the telegraph office and explained to the gentleman in charge that we had a draft on the way that would be paid by the Lyon County Bank or the amount would be transferred by the Lyon County Bank to Messrs. Pitt and Campbell, and unless we could get a telegram through before banking hours on the 30th of April, 1907, the next morning, we would be out \$11,250. He thereupon read the telegram and then left us at the counter; he said he would see what he could do; he passed into a rear office; after a short time he returned and said he would take and accept the message from us. I said it had to be an insured message guaranteeing the delivery of the message before banking hours on April 30th. He then informed me that it would cost us extra for the insurance of the message and he then stated the amount and I paid the amount asked, namely, \$1.45.

Mr. HODGHEAD.—If your Honor please, I desire to interpose an objection to the testimony at this point that the witness has just reached. We had no objection to the preliminary evidence of the circumstances, but the witness is now proceeding to give testimony of an oral contract of insurance guaranteeing—

(Testimony of William Lange, Jr.)

The COURT.—Just state what the circumstances were. I will pass on that. I understand what you mean. Just state what the contract was. It is for the Court to determine whether it was a contract of insurance or not. Ask him to state what was said.

WITNESS.—(Continuing.) The agent said he would take that [65] message and the message would be delivered that night, namely, the night that the telegram was sent. After paying for the message the agent inserted at the top of the telegram the words "Deliver immediately." They were not there when I offered the message for transmission. The message was in typewriting and was prepared in my office in Oakland prior to going to the telegraph office, and I kept a copy, which is the writing shown to me. After the message was accepted for transmission by the telegraph company I wrote the words "Deliver immediately," into my copy and put the figures "1.45" on it. That was the amount I paid for the message and was the amount the agent asked. He said it would cost us extra and that was an extra charge to insure the message. He did not state what the regular charge would be, and I don't know what the regular charge for a message of that length is. We then went home. The message was left for transmission. We placed no limit upon the amount of the charge.

When Mr. Poorman went to Nevada to negotiate this contract with Pitt and Campbell we gave him the money to make the first payment thereunder.

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(Testimony of William Lange, Jr.)

I was in Yerington myself in connection with this transaction in January or December previous. We called on the Lyon County Bank, that is Mr. Hastings and myself, and had some talk with the bank in reference to that, if we entered into a contract we would not have to bring gold to Yerington. The bank said that could be arranged. Subsequently, the contract with Pitt and Campbell was negotiated by our attorney and we ratified it.

The COURT.—After the contract was entered into did you again communicate with the bank at Yerington?

A. No, your Honor, not in reference to payment. Mr. Poorman, our attorney, had already arranged that.

WITNESS.—(Continuing.) The next day after sending the telegram we made inquiry at the telegraph office respecting it. We asked the same agent whether the telegram had been promptly delivered. [66] He answered that he had no advice as yet. This was about 11:00 o'clock in the morning, as near as I can recollect. We had not yet received any word from Yerington or the Lyon County Bank. Later in the day we inquired again whether they had heard from the message; Mr. Poorman was with me. The agent said they had heard nothing from it, that the message had gone out on time, but had not been repeated to him. He said he would use the extra money that had been paid and send another telegram. We replied that we stood by our mes-

(Testimony of William Lange, Jr.)

sage, that we paid for an insured immediate delivery message, and if he wanted to send any message it would be up to the company to send it and not to us. I made a subsequent inquiry respecting the message—subsequent to the 30th of April. I received a reply by telegram from the Lyon County Bank in reference to the receipt of the registered letter enclosing the draft.

Mr. POORMAN.—I offer the original telegram in evidence.

The original telegram was here received and read in evidence and marked Plaintiffs' Exhibit 3, which reads as follows:

**Plaintiffs' Exhibit No. 3—Telegram Dated Oakland,  
April 29, 1907, Hastings and Lange to Lyon  
County Bank.**

“Form No. 260.

“THE WESTERN UNION TELEGRAPH COM-  
PANY,

Incorporated.

23,000 Offices in America.

Cable Service to All the World.

ROBERT C. CLOWRY,

President and General Manager.

Receiver's No.                      Time Filed.                      Check.

Send the following message subject to the terms on back hereof, which are hereby agreed to:

“Oakland, April 29th, 1907.

“Lyon County Bank,

Yerington, Nevada,

“Draft mailed you Saturday under mistake. Do

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not pay any sum to Pitt or Campbell.    Return draft.  
Letter follows.

HASTINGS and LANGE."

"Read the notice and agreement on back." [87]

That on the back of said blank form on which said message was the following:

**"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:**

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

"Correctness in the transmission of the message



to any point on the lines of this Company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent, for any distance not exceeding 1,000 miles, and two per cent, for any greater distance. No employee of the Company is authorized to vary the foregoing.

“No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company’s messengers, he acts for that purpose as the agent of the sender.

“Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

“The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

ROBERT C. CLOWRY,  
President and General Manager.”

Mr. HODGHEAD.—I understand that if this message, which is a contract and message combined, is offered, it is the entire contract which is introduced, including the stipulations on the message blank.

Mr. POORMAN.—Yes, if they have any bearing on it. [68]

(Testimony of William Lange, Jr.)

Q. Mr. Lange, did you read the stipulation on the back of the telegraph blank on which your message was accepted for transmission? (Referring to the original telegram of April 29th.)

Mr. HODGHEAD.—I object to that as immaterial whether he did or not.

The COURT.—I cannot say whether it is or not. The case is not before a jury. It does no harm.

Mr. POORMAN.—Did the agent of the defendant to whom you gave that message direct your attention to any of the stipulations on the back of the telegraph blank?    A. No, sir.

Q. You had no knowledge of the contents of these stipulations?    A. No, sir.

Mr. HODGHEAD.—I object to all these questions, your Honor, and we desire to reserve an exception if your Honor rules on the matter as to whether he read the stipulations. The rule is clear on that, for it is immaterial.

The COURT.—I have ruled against you on that. You can reserve an exception. I mean I have admitted it.

Mr. HODGHEAD.—We reserve an exception, being

DEFENDANT'S EXCEPTION No. 1.

WITNESS. — (Continuing.) The letter now shown me dated Oakland, California, April 27th, 1907, addressed to Lyon County Bank, Yerington, Nevada, was signed and sent by me on that day. The letter was offered and read in evidence and

marked "Plaintiffs' Exhibit No. 4," which reads as follows:

**Plaintiffs' Exhibit No. 4—Letter Dated Oakland, April 27, 1907, Wm. Lange, Jr., to Lyon County Bank.**

"WM. LANGE, Jr.

Rooms 294-295 Bacon Building.

Telephone, Oakland 7423.

Oakland, Cal.

Pacific States Refineries.

Bald Eagle Oil Co.

Bunker Hill Oil Mining Co.

Oakland Cal., April 27th, 1907.

Lyon County Bank,

Yerington, Nevada. [69]

Gentlemen:

We have this day forwarded to you by registered mail a draft for \$11,250 to apply on the payment due you under escrow of Messrs. Pitt & Campbell and ourselves.

I write you this letter so that you can enquire at the Post Office for the registered letter containing the draft.

Thanking you in advance for your attention to this matter, I am,

Very truly yours, (Signed)

WM. LANGE, Jr."

This letter was sent prior to sending the registered letter, and my idea in sending it was that it takes longer for a registered letter to get to a destination than it does a letter through the ordinary mails, so

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I was informed. I also signed the letter now shown me, which is also dated April 27, 1907, addressed to the Lyon County Bank, Yerington, Nevada. Said letter was offered and read in evidence and marked "Plaintiffs' Exhibit No. 5," which reads as follows:

**Plaintiffs' Exhibit No. 5—Letter Dated Oakland April 27, 1907, Wm. Lange, Jr., to Lyon County Bank.**

"WM. LANGE, Jr.

Rooms 294-295 Bacon Building.

Telephone, Oakland 7423.

Oakland, Cal.

Pacific States Refineries.

Bald Eagle Oil Co.

Bunker Hill Oil Mining Co.

Oakland Cal., April 27th, 1907.

Lyon County Bank,  
Yerington, Nevada,

Gentlemen:—Enclosed herewith we hand you draft of \$11,250.00 issued by the Bank of Fruitvale on First National Bank of San Francisco to apply on the Escrow you hold from J. U. Hastings and myself and Messrs. Pitt and Campbell. The Banks here assure me that they will not charge any exchange.

Kindly wire at my expense when you receive this draft.

(Signed) Very truly yours,

WM. LANGE, Jr." [70]

I recognize the telegram now shown me, dated Yerington, Nevada, April 30th, 1907, addressed to William Mangen, Jr., Bacon Building, Oakland, and signed Lyon County Bank. At that time my office

was in the Bacon Building. The message was delivered to me by the Western Union Telegraph Company. It was the telegram I was expecting from the bank in answer to the letter which has been introduced in evidence. Said message was offered and read in evidence and marked "Plaintiffs' Exhibit No. 6," which reads as follows:

**Plaintiffs' Exhibit No. 6—Telegram Dated Yerington, April 30, 1907, Lyon County Bank to Wm. Mangen, Jr.**

"156 xn mg f 6 collect, via Wabuska.

Yerington Nev Apl 30 07

Wm Mangen jr Bacon Blg Oakland—

Your draft received this morning

LYON COUNTY BANK,

1250 pm"

I received the message May 1st. I also received the receipt for the registered letter that I sent enclosing the draft. The writing now handed me I recognize as the receipt for the registered letter, which is the only registered letter or package I sent to the Lyon County Bank. It came to me in due course of the mail. The signature on it I recognize as that of Mr. Whitacre, cashier of the Lyon County Bank. Said receipt was offered and read in evidence and marked "Plaintiffs' Exhibit No. 7," and reads as follows: [71]

**Plaintiffs' Exhibit No. 7—Registry Return Receipt.**

**“REGISTRY RETURN RECEIPT.”**

Received from the Postmaster at Yerington Nev.

Delivering office

Registered (Letter)

(Parcel)

No. 16797    From Post Office at Oakland, Cal.,  
Addressed to Lyon Co. Bank.

Date 4/30/1907

Date of Delivery

When delivery is  
made to the agent  
of the addressee,  
both addressee's  
name and agent's  
signature must ap-  
pear in this re-  
ceipt.

LYON COUNTY BANK,

(Signature or name of addressee)

E. H. WHITACRE,

(Signature of addressee's agent)

A registered article must not be delivered to any-  
one but the addressee, except upon addressee's  
written order. When the above receipt has been  
properly signed, it must be postmarked with name of  
delivering office and actual date of delivery and  
mailed to its address, without envelope or postage.

[72]

(Reverse side)

This card must be neatly and cor-  
rectly made up and addressed at the  
post office where the article is regis-  
tered.

The postmaster who delivers the reg-  
istered article must see that this card is  
properly signed, postmarked and  
mailed to the sender.

Postmark of de-  
livery office

Y
Apr 30
9 AM
1907
NEV.

and date of  
delivery.

POST OFFICE DEPARTMENT

Official Business

Penalty for private use to  
avoid payment of postage, \$300.

Return to:

Name of sender	Wm. Lange, Jr.,
Street and number,)	
or post office box)	294-295 Bacon bldg Oakland, California."

After receiving the telegram marked "Exhibit No. 6," I made further inquiries of the telegraph company on the 1st day of May respecting our message of April 29th. Mr. Poorman and I went to see the telegraph company, and the agent informed us that he had no further information only to this effect, that it had been reported to him that this message had either gone to Goldfield or to Tonopah. He then offered to refund the money to me that I had paid for the message. This was in the presence of Mr. Poorman. Mr. Poorman informed me not to accept any money, that we had made a contract and that we would stand by our contract. Mr. Poorman himself made that statement to the agent, who was the same person [73] who received the message on April 29th. I received a telegram from the Lyon County Bank in answer to our telegram of April 29th. It is the telegram which is now shown me and was delivered by the Western Union Telegraph Company. Said telegram was offered and read in evidence, and marked "Plaintiffs' Exhibit No. 8," and reads as follows:

**Plaintiffs' Exhibit No. 8—Telegram Dated Yerington, May 2, 1907, Lyon County Bank to Hastings and Lange.**

“Xn 286 mg pn    10 collect 6:45 P Via Wabuska  
Yerington Nev May 2-07

Hastings and Lange.,

Care Folger O D Oakland Cal

Your wire just received today.    Payment has been made.

**LYON COUNTY BANK.”**

I don't think I made any inquiry at the telegraph office after receiving this message. I didn't know that at the time Wabuska, Nevada, was the terminus of the Western Union Company's lines for Yerington messages and that in order to communicate with Yerington by telegraph from Oakland, California, the message would have to be transmitted over another company's telephone line, the Yerington Electric Telephone Company's line, from Wabuska to Yerington. The agent, when I sent the message, did not tell me so, I knew nothing of any arrangement between the Western Union Company and the Yerington Electric Company regarding the transmission of messages. I have been at Wabuska. There is a small settlement there. The money represented by the draft sent to the Lyon County Bank has never been recovered from any source. It has not been repaid by any one. The defendant herein denied all liability. I never sent any other communication to the Lyon County Bank concerning the draft, and it had no knowledge of our desire to withhold payment



(Testimony of William Lange, Jr.)

except through the telegraph message of April 29th, 1907. I don't know what the purpose of the agent, was in writing [74] the words "Deliver immediately" upon the message. He put it on there after I offered the message and paid for it. He stated that it would be delivered that night. I told him it was an urgent message. Mr. Hastings and I told him we had sent a draft by registered mail to the Lyon County Bank at Yerington, Nevada, that this draft would be paid the next morning when the bank opened unless we could get the message through to Yerington to stop the payment at the Lyon County Bank authorizing them to withhold the payment. I told him if we did not get the telegram through, we would lose the \$11,250, that it would be paid to Pitt and Campbell. We went into that very thoroughly with him. I stated the amount distinctly. I showed him the contract we had with Pitt and Campbell.

Cross-examination by Mr. HODGHEAD.

WITNESS.—I recognize the young man sitting here, as the clerk of the Telegraph Company who received this message from us on the night of April 29th. He said the message would go through that night, he did not say anything about Yerington not being a night office.

Q. As a matter of fact, did you not know that the Yerington office was not an office that was open in the evening or at night?     A. I did not.

Q. As a matter of fact, did you not know that the

(Testimony of William Lange, Jr.)

Yerington office was closed before your message was filed in Oakland? A. I had no knowledge of that.

I have been up to Yerington only once. I went by way of Wabuska. I did not know the Western Union had no line into Yerington. I think I have sent telegrams there before. The agent never said a word about there being no Western Union office in Yerington, he said it would be delivered that night.

Mr. HODGHEAD.—Q. You stated that at a subsequent interview [75] he said the message had not been repeated to him. Did you understand that this message that you sent was a repeated message?

A. No, sir.

Q. You understood that it was an unrepeated message? A. No, sir.

Q. What did you understand about it?

A. It was an insured message; it insured the immediate delivery of the message.

The COURT.—Q. What did he state to you when he told you the amount that it would be necessary to pay?

A. He stated to me it would cost me extra than an ordinary message.

Q. Why?

A. Because it was an insured message.

The agent said nothing to me about having the message repeated. I knew a message could be repeated.

Q. Did you ask him anything about that?

A. No, sir.

Q. And he said nothing to you about it?

(Testimony of William Lange, Jr.)

A. No, nothing.

Q. All you stated to him was the fact showing the necessity that it be immediately delivered and he told you how it was to be done?

A. How it was to be done.

Q. Did you order him to repeat the message?

A. No, sir, I did not.

Q. Did you pay for a repeated message, or did you understand only that you were paying for an insured message?

A. I was paying for an insured message?

Q. You understand, do you, Mr. Lange, that there are two kinds of telegrams, a repeated message and an unrepeatd message, and that they go at different rates? I understand you to say that you did not pay for a repeated message. [76]

Mr. POORMAN.—He stated he knew you could have a message repeated; he did not say he knew it went at different rates.

Mr. HODGHEAD.—Well, I am assuming he did.

The COURT.—I don't see the materiality of the question of repeated messages here. It is not a question of erroneous transmission, it is in transmitting, in delivering.

Mr. HODGHEAD.—I think the materiality will appear, because the two messages are classified. I am trying to find out what kind of a message this was. The materiality of it, I think, will appear later.

Q. I want to ask you, Mr. Lange, if you paid for repeating the message as a repeated message?

(Testimony of William Lange, Jr.)

A. No, sir.

The agent told me next day, or at some subsequent time, that it was reported to him that the message had gone to Goldfield or to Tonopah that is all I know about it. When I mailed the draft on April 27th I expected the registered letter would reach Yerington by the 30th of April. I inquired at the postoffice. I think the train reached Wabuska in the evening and the mail went to Yerington by stage, I could not say whether that night or the next morning.

Mr. HODGHEAD.—Q. You say in the telegram you mailed the draft by or under a mistake. What was that mistake? Did you mean to mail it to somebody else?

A. I guess the mistake was that I didn't want to have them pay the draft. When we mailed the draft we intended the bank to receive it. At that time we thought the mine was good.

The COURT.—It was sent under mistake or misapprehension if he supposed that the transaction was all right when he sent it but ascertained later that it was not. [77]

#### Redirect Examination.

I explained to the agent at the time that the message would have to be delivered before a given time to be of any use, that is before banking hours of Yerington, and he said I didn't have to worry about that, that it would be delivered that night. At that time I had no knowledge that Yerington was not a

(Testimony of William Lange, Jr.)

night office. I had never sent a message out of Yerrington. I knew the difference between a repeated and an unrepeatd message.

Q. Can you say positively that you were not seeking in any fashion to have a repeated message sent?

A. Positively. I did not want a repeated message sent.

Q. What was the distinction in the form of words you used in asking for the message that you did ask for? What was the particular phraseology?

A. I asked for a guaranteed message, as I was told by Mr. Ruddock, who had been there, that it must be a guaranteed message in order to have it right.

Q. You explained, as you have stated, to the agent in charge of the telegraph office just what your trouble and your situation was? A. Exactly.

Q. Did you leave it to him to dictate the manner in which you should send that message? Did you put it up to him as to the method in which that message should go through? A. No.

Q. I mean as to the mode adopted. You said you wanted an insured or guaranteed message?

A. Yes, sir, I did.

Q. You told him your trouble?

A. Yes, sir, I did.

Q. Did you make any suggestion to him further than that? In other words, did you place yourself in his hands and abide by his instructions? That is what I am trying to get at. [78]

A. Yes, sir; I did.

The COURT.—Q. You told him what you wanted

(Testimony of William Lange, Jr.)

and he told you how to do it, is that what you mean?

A. That is the point; yes, sir.

Mr. POORMAN.—Q. And you did whatever he asked, namely, you paid the amount he asked and he thereupon wrote the words “Deliver immediately.”

A. Yes, sir. The only thing I told him was what this friend of mine said about insuring the message, and he agreed with me that that was the proper thing to do to go through with the message.

Recross-examination.

I stated that when I filed the message I did not read the conditions on the back of it. I had been in the habit of sending telegrams in my business prior to that time. I had sent telegrams previous to that time up to Yerington, concerning this same contract. I never paid any attention to the writings or conditions on the telegraph blanks. We had blanks of the Western Union in our office.

Q. Did you ever observe that there was any writing at all on these blanks? A. I presume so.

Q. Did you ever read the sentence immediately preceding the message which is as follows: “Send the following message subject to the terms on the back hereof, which are hereby agreed to”?

A. I never paid any attention to that. We have the blanks in the office, but I never read that.

Q. Did you ever notice the word “Send” printed in very prominent type on the message blank?

A. I may have seen it but I did not pay any attention to it. [79]

(Testimony of William Lange, Jr.)

**Redirect Examination.**

At that time and for a long time previous we had a stenographer in the office. Most of the telegrams were dictated.

The COURT.—What is the object of this?

Mr. POORMAN.—Simply to show that the message blanks were not brought at all prominently to his attention.

The COURT.—That is wholly immaterial. If it is a contract that he is bound by, his failing to read it does not obviate its effect at all. The only question would be whether he is bound by it or not.

Mr. POORMAN.—I will ask to have admitted in evidence our claim of damages. I simply want to meet the proposition that the claim was in due form according to the stipulation on the back of the telegraph blank, which I understand counsel admits.

Mr. HODGHEAD.—Yes.

Mr. POORMAN.—And that it conforms in all respects to that rule; that it was in writing and was in due form and it stated the particulars of the demand.

Mr. HODGHEAD.—We make no point on that.

**Testimony of J. U. Hastings, in His Own Behalf.**

J. U. HASTINGS, one of the plaintiffs in said cause, was called as a witness for plaintiffs, and being first duly sworn, testifies as follows:

I reside in San Jose. I am a manufacturer and refiner. In April and May, 1907, I resided in Haywards, California. I am one of the plaintiffs in the action. I recognize the Plaintiffs' Exhibit No. 3 as

(Testimony of J. U. Hastings.)

a telegram to the Lyon County Bank and remember offering the message for transmission. I will state the circumstances. I received a telephone message from Mr. Lange on April 29th stating that he had met Mr. Ruddock and Mr. Bliss and they had reported to him that the mine which they went up to investigate was [80] of no value. I immediately went down and saw Mr. Lange and we talked the matter over, and agreed that we would send a telegram to our representative, the Lyon County Bank, and have the draft returned to us. The mine referred to was the Kennedy Consolidated Mine. The telegram related to the payment under the contract with Pitt and Campbell. That contract was signed by Samuel Poorman, Jr. as our attorney in fact. Regarding the message, Mr. Lange and I went to the Western Union Telegraph Company I think between eight and half past. We explained to the gentleman in charge of the office that we had mailed a draft to our representative, the Lyon County Bank, Yerington, Nevada, and we wished the same returned to us. I told him that we had mailed this draft and the draft was payable on or before the 1st of May and that we wished to recall it. I asked him the manner in which he could guarantee that we could send a message to our representative at the Lyon County Bank; I told him that if the draft was delivered to the Lyon County Bank and payment made on it before it was intercepted, that we would lose the amount of the draft, which was \$11,250. After explaining this matter, he went into a rear of-



(Testimony of J. U. Hastings.)

fice and I think was gone a minute or two and returned, and he said, "Under those circumstances, you had better send a guaranteed immediately delivery of that message, have the immediate delivery of the message guaranteed," and I told him that that is what we wanted. He said there would be an additional cost to have the immediate delivery of it guaranteed.

Mr. HODGHEAD.—Your Honor, I desire to interpose the same objection, that this is an attempt to prove an oral contract in express conflict with the written contract.

The COURT.—The Court will pass on the effect of the evidence. He is simply stating the facts. If it does not make an insured message, Mr. Hodghead, then of course you are not injured.

Mr. HODGHEAD.—Certainly not; but if this evidence is permissible, then it would prove an insured message. [81]

The COURT.—No, it would not, not unless it would in law.

Mr. HODGHEAD.—It would not in law.

The COURT.—Then the fact that it is called an insured message would not make it so.

Mr. HODGHEAD.—Our proposition is that if this does not tend to prove an insured message, it is not admissible.

The COURT.—Certainly it is admissible to state the circumstances under which it was taken. Its legal effect will thereafter be determined.

(Testimony of J. U. Hastings.)

WITNESS.—(Continuing.) After he returned from the rear room, he said that the message would be delivered without fail before banking hours the next morning. He went into the rear room and then came back and told me the way to send it. He did not explain the purpose of his going out. He just went out and then returned and made that statement. Mr. Lange paid him for the telegram and took a copy of the same. I do not know the amount he paid but he paid all that was asked. I did not see the actual coins. The agent demanded something that he stated to be in addition to the usual tolls, and Mr. Lange paid whatever was asked. I don't remember who put the words "Deliver immediately" upon the message. They were not there originally. I think the agent of the Western Union did but I don't remember. The agent didn't explain, and I did not know that Yerington was not a night office nor that the Western Union lines did not go into Yerington nor that Wabuska was the terminus of the Western Union lines and that messages for Yerington would have to be transmitted from Wabuska to Yerington over the lines of the Yerington Electric Company. I have been in Yerington once but I had never sent a message out of Yerington.

Q. Did the agent suggest any particular formalities in connection with sending the kind of message you wanted?

A. He suggested that under the circumstances we send a guaranteed message.

(Testimony of J. U. Hastings.)

Q. I mean did he suggest any formalities in connection with it? A. He did not.

I never read the stipulations on the back of the message and had no knowledge of them.

Q. Did the agent call your attention to any of those? A. No, sir. [82]

Mr. HODGHEAD.—Objected to. This question was objected to upon the ground that it is immaterial, which objection being overruled the defendant reserved an exception thereto, being

DEFENDANT'S EXCEPTION No. 2.

WITNESS.—(Continuing.) We determined on receipt of the information from Messrs. Bliss and Ruddock respecting the value of the mine to abandon the Pitt and Campbell contract and not to go on any farther with it, and this message was sent in pursuance of that determination. We never went on with the contract and never made any further payments thereunder, and the \$11,250 was never returned to us or paid to us by any one. At the time the message was sent I did not know the telegraph rates between Oakland and Yerington. On the morning of April 30th, Mr. Lange and myself went to the telegraph office and inquired of the same agent whether he had received any notification of the delivery of the message, and he said he had not. I never made any further inquiry. There was a settlement at Wabuska and a stage line from Wabuska and Yerington, and a stage station at Wabuska.

Q. Did the defendant company at any time to your knowledge make any offer of the return of extra

(Testimony of J. U. Hastings.)

charges or of the charges on his message or make any offer of any refund?

A. Not that I personally know of.

The COURT.—That is, they never made any to you?

A. No, your Honor.

WITNESS.—(Continuing.) On the occasion that I went to the telegraph office with Mr. Lange to make inquiries respecting the message, there was simply the report that the agent had no report on the message. I was in Yerington prior to the date of the Pitt and Campbell contract and with Mr. Lange called on the Lyon County Bank. I met Mr. Whitacre. We had some preliminary negotiations with him respecting a possible contract that was to be entered into and respecting the remittances thereunder. As far I know the [83] nature of our conversation was that they were to represent us in case the contract was made, but I do not remember the exact nature of it.

Cross-examination.

When the clerk at the time we offered the message went into the back room, I do not know whether he went in regard to this message or on some other business. I knew nothing about that at all. There was a rear room and a front room connected with the telegraph office.

**Testimony of Samuel Poorman, Jr., for Plaintiffs.**

Mr. SAMUEL POORMAN, Jr., being called as a witness for plaintiffs, being duly sworn, testified as follows:

I am the attorney for plaintiffs herein. I was sent twice by them to Yerington, Nevada, in connection with the negotiations on the Pitt and Campbell contract here in evidence. The first negotiations fell through. At the subsequent time we entered into the contract marked Exhibit 1. I paid the \$7,500, being the first payment under the contract. I arranged with the bank at Yerington about cashing the draft. After signing the contract, I called to the attention of the Lyon County Bank, through Mr. Whitacre, that this contract called for the payment to be made in gold coin; I said, "I don't want to have to come up here every time a payment is due thereunder and bring gold coin, or ship it in; can't I arrange with you to advance the money on the bank draft sent you by Lange & Hastings?" He said he would regard it as good, and that he would treat it as gold coin. He used the expression, "treat it as gold coin." Then I said, "You will advance the money for us so we can relieve our mind of any further apprehension regarding future payments so long as we get a San Francisco draft to you?" He said he would. I said I would pay any exchange that was desired, or any charges they might have for their trouble, or any interest on the money by reason of advancing [84] that amount. So far

(Testimony of Samuel Poorman, Jr.)

as I recollect that is all that occurred. Mr. Pitt and I went down to Reno and arranged, I think, the transfer of stock to the bank, which is admitted to have been deposited in escrow. After that time, the next matter that I know of my own knowledge in this connection was the inquiry made at the telegraph office on the 30th of April, when I went there with Mr. Lange; it was the second occasion he spoke of going to the telegraph office on that day. At that time I saw the gentleman who he said was the man who had taken the message as agent of the company; he is the gentleman in the rear, here. At that time Mr. Lange asked him whether he had any return on the message sent to Yerington; he said that the message had gone out on time, but had not been repeated. He offered to use the extra money that was paid for the message in sending out, I think he said, a tracer; Mr. Lange does not state it that way, but I think he said to trace it. I stated at the time myself that we had paid for a guaranteed message, and we did not propose that the money should be diverted to any other purpose, that we stood by the arrangement we had made with him, and if the company sent any message they could send it on their own hook. I don't remember whether I went back—yes, I did, I went back with Mr. Lange at a subsequent date, but I can't remember the date. At that time we saw the same gentleman, and upon Mr. Lange making a similar inquiry respecting the fate of the message of April 29th, he offered to return to Mr. Lange the amount of money,

(Testimony of Samuel Poorman, Jr.)

stating at the same time that the message had gone, as I think, to Tonopah; Mr. Lange says it is either Goldfield or Tonopah. Mr. Lange refused to take the money, and I again stated that the message had been sent under an agreement that it should be there the following morning before banking hours, that we were damaged to the extent of \$11,250 by it, that we intend to stand by the contract and to hold the telegraph company liable in the event it turned out that the money was lost to us. [85] I had no further dealings with the telegraph company except in the matter of presenting the claim for damages, which I did within sixty days after the sending of the message.

The COURT.—Do their rules require that?

A. Their stipulations do.

The COURT.—I do not wish to exclude it if it has any materiality, but they admit you made a claim in due form.

Mr. POORMAN.—Very well, if that is admitted.

(Continuing.) After I had made at least one or perhaps more inquiries of the Western Union Co. about our claim for damages, on February 26, 1909, Mr. Edward B. Harrington called at my office in this city, and introduced himself as the agent of the Western Union Company who had in hand the matter of the claim of plaintiffs. He asked about a number of people connected with the matter, and I gave him a letter addressed to probably half a dozen people—the Lyon County Bank and everybody I could think of who could throw any light upon the

(Testimony of Samuel Poorman, Jr.)

subject—asking them to furnish the Western Union Company with all information they possibly could in connection with the Pitt and Campbell transaction and the sending of the alleged delayed message. I told him that the agent in Oakland had stated in my presence that the message had gone to Tonopah. He said no, it did not go to Tonopah, it went to Goldfield, or just the reverse. I think that is all I know having any bearing on the case.

**Deposition of George F. Willis, for Plaintiff.**

Deposition of GEORGE F. WILLIS, taken on behalf of defendant, under a commission issued out of court upon the stipulation of the parties. The deposition was read by plaintiffs' counsel as a part of their case.

GEORGE F. WILLIS, being duly sworn, testified as follows:

My name is George Francis Willis. I reside at Yerington, and did in April and May, 1907. I was at that time teller in the [86] Lyon County Bank at Yerington. F. O. Stickney was cashier and E. H. Whitacre assistant cashier at the time. I handled the escrow matters a good deal and drew most of the drafts, attended to the mail work, and part of the time I attended to the cashier's matters. Mr. Whitacre and myself were in active control of the bank in March, April and May, 1907. I recall the escrow agreement between Pitt and Campbell on the one part and Lange and Hastings on the other left with the Lyon County Bank about the 16th of March,



(Deposition of George F. Willis.)

1907, and remember something of the telegraph message dated April 29th. I remember receiving the message, which is marked "Exhibit 3." A draft mailed to the Lyon County Bank from Lange and Hastings was received by it to make the payment of \$11,250 due on the agreement on or before May 1st. We got the draft on the 29th or the 30th of April. We took it into our business on the 30th of April. We may have possibly gotten it from the Post Office on the 29th, but I am not positive about that. We had not received the telegram when we got the draft.

Q. The telegram referred to from Lange and Hastings directed the Lyon County Bank to return the draft. I would like to ask you, Mr. Willis, whether, if this telegram had been received from Lange and Hastings prior to or at the time of the receipt of the draft, the bank would have returned the draft, as directed in the message?

A. I think my recollection of my talk about the matter at the time is that we said the telegram was too late to do anything anyway, but we felt that we were not in a position to return the draft. We thought we would hold the draft until Lange and Hastings and Pitt and Campbell settled it as to who the draft belonged to. I don't think we would have returned it. We would have been putting ourselves liable to Pitt and Campbell had we returned it. They might have claimed that when we received the draft the payment was complete and the money belonged to them and not Lange and Hastings. [87]

Q. In other words, Pitt and Campbell would con-

110 *The Western Union Telegraph Company*

(Deposition of George F. Willis.)

tend that you had no right to return the draft?

A. Yes, sir. We thought we would very likely place ourselves in a position responsible to them for payment.

Q. In recollecting the conference which you and Mr. Whitacre had, could you state whether you would have returned it or not?

A. I don't think we would have returned it. I think we would have held it.

Q. Then there were three courses, one of which the Bank would have had to pursue had the message been received, as stated; one to pay the money to Pitt and Campbell, another to return the draft to Hastings and Lange and the third to hold the draft until the matter was determined. And which course, in your judgment, would the Bank have taken?

A. We should have held the draft.

There was a letter with the draft which came by registered mail and another letter received a day earlier from William Lange, both letters dated April 27th, the letters being Exhibits 4 and 5 in evidence, I think we got this letter, Exhibit 4, the day before we got the registered letter.

Q. In due course of mail? A. I think so.

WITNESS.—(Continuing.) We got it a day earlier than the registered letter. I think we got this (Exhibit 4) in the regular mail on the 29th. We received another letter with the draft.

At the time the payment was made on March 16th, the first payment of this agreement, the party who

(Deposition of George F. Willis.)

made that payment—I don't know who it was—referring to the future payments, said something about payments being made in gold and spoke about expenses necessary to transmit coin up here, and asked us if we could accept their draft as coin. I told them we could, providing they would send exchange for transmitting coin. So, that [88] was agreed upon. We had some little talk about the rate of exchange.

Q. By referring to handling payments through draft, was anything said about the individual draft of Hastings and Lange or bank draft?

A. I think we said San Francisco exchange. When we say San Francisco exchange, we mean bank draft, not individual checks.

Q. As a matter of fact, which was received on the evening of April 29th or the morning of the 30th, a bank draft or an individual draft?

A. A bank draft on the Crocker National Bank and it was taken up by the Fruitvale Bank.

Q. As a matter of fact, wasn't it on the First National?

A. No, I think not. It seems to me it was the Crocker National.

Q. Did you treat the draft so received as gold coin?

A. We did. We credited it up immediately to the plaintiff because if we didn't credit it on that day the escrow would have expired on the following day. I might explain that this draft had to go out immediately so I made the credit to Pitt and Campbell

(Deposition of George F. Willis.)

that day to offset the draft made that day.

Q. Did the reference in the letter transmitting the draft to the effect that no exchange would be charged have any bearing upon the treatment of the draft as payment?

A. This statement is an apology from Lange for not including exchange in his draft to pay us for cashing the draft. They had agreed to send us some exchange to pay us for cashing these drafts. I had explained to him that as we treated their San Francisco exchange as cash, crediting Pitt and Campbell up with it immediately on receipt of the same, we should have some exchange to pay us for transmitting the cash here if necessary, or advancing the money previous to the time that we received any credit in San Francisco for it. [89]

Q. Do I understand that when you got the draft and that letter that you treated the draft as gold coin? A. We did.

Q. Do you know whether or not there was any request at any time from Hastings and Lange, or anyone representing them, that Pitt and Campbell extend the time for making the third payment under this agreement?

A. There was. I am satisfied as to that.

Cross-examination.

The bank opened for business on April 30th, at 9:30 A. M. I don't know at what time of that day we received the registered letter covering the draft sent us by Hastings and Lange; I suppose in the morning. We always got our mail in the morning.

(Deposition of George F. Willis.)

The signature on the postal registry receipt shown me (Exhibit No. 7), is Mr. Whitacre's signature. The date on the postal registry receipt 4/30/1907, to the best of my belief correctly represents the date of the receipt of that letter by the bank. Those figures indicate the date April 30, 1907. Upon receipt of that letter we remitted the draft to our correspondent in San Francisco, charging their account with same for our credit. Immediately after receiving the draft in the morning of April 30th, we telegraphed Mr. Lange at Oakland "Your draft received this morning." This is the message which was sent William Manger, Jr. Only one message was sent. We never addressed any message to William Manger, Jr. Lange requested us to telegraph immediately when we got the draft. He seemed to be anxious to know when we got it, and we did so. The message marked "Plaintiffs' Exhibit 3," which we received on May 2d, was the only message we received relating to the draft except that a duplicate of that message was received on the same day.

We did not credit Pitt and Campbell at all. We issued a [90] certificate of deposit to W. T. Campbell for one-half of the draft, and a like certificate of deposit to W. C. Pitt for one-half of the draft, following instructions of the escrow agreement. The amount of each certificate was \$5,625. They were issued between the hours of opening and closing the bank's business on that day. The draft was payable to the Lyon County Bank.

Q. You gave credit to Pitt and Campbell on your

(Deposition of George F. Willis.)

books for the aggregate amount of the draft and forwarded the draft to San Francisco for collection, did you not?

A. We issued certificates of deposit for the aggregate amount of the draft and charged our San Francisco correspondent with the draft and forwarded it to them for our credit. I think we received a letter the day before, notifying us that the draft had been sent. The draft we received by registered letter on April 30th.

Q. When you say that you treated the draft as gold coin you did not mean that you credited Pitt and Campbell with the aggregate amount on your books and then collected the draft to balance that credit?

A. When I say we treated the draft as gold coin, I mean that had we accepted the draft for collection and forwarded it to our San Francisco correspondent, the time limit for the escrow payment would have expired before the draft could have been presented in San Francisco and returns made to us. Also, we charged no exchange on the draft, making the escrow payment in full of the amount of the face of the draft.

Prior to the issuance of the certificates of deposit to Pitt and Campbell, the Lyon County Bank had no knowledge of the desire of Hastings and Lange to prevent payment to Pitt and Campbell of the amount covered by the draft. On the contrary, we had every reason to believe that they desired this payment made immediately [91] upon receipt of the draft.

Q. You say that you are satisfied that there was a

(Deposition of George F. Willis.)

request by Hastings and Lange that Pitt and Campbell extend the time for making the third payment under the escrow agreement. What do you know of your own knowledge upon that subject?

A. My answer was based upon the contents of letter dated July 4, 1907, signed by William Lange, Jr., addressed to Lyon County Bank, and marked Exhibit No. —, also a letter dated July 16, 1907, addressed to W. C. Pitt, Lovelocks, Nevada, signed assistant cashier, marked Exhibit No. —.

WITNESS.—(Continuing.) When I say that I am satisfied there was such a request, I mean that the correspondence just referred to shows that there was such a request. Lyon County Bank first received the message marked Exhibit No. 3 on May 2, 1907. We issued the certificates of deposit to W. C. Pitt and W. T. Campbell three days previous to receiving the telegram. On May 2, 1907, Lyon County Bank sent from Yerington to Hastings and Lange at Oakland the message in evidence marked Exhibit No. 8. On April 30th, Lyon County Bank sent from Yerington to Lange at Oakland the message in evidence marked Exhibit No. 6, with the exception that the addressee's name on Exhibit No. 6 is William Mangen, Jr., and our message was sent to William Lange, Jr.

**Deposition of E. H. Whitacre, for Plaintiffs.**

Deposition of E. H. WHITACRE, taken on behalf of defendant, under a commission issued out of court upon the stipulation of the parties. The deposition was read by counsel for plaintiffs as a part of their case.

(Deposition of E. H. Whitacre.)

E. H. WHITACRE, being duly sworn, testified as follows:

I reside in Yerington, Nevada. During the years of 1906-07 I was assistant cashier of the Lyon County Bank at that place. I recollect the escrow agreement between Pitt and Campbell on one [92] part and Lange and Hastings on the other, filed with the bank about March, 1907. I remember a draft was received by the bank to make payment on the contract due on or about the 1st of May, 1907, and that the bank received a telegram instructing the bank not to pay Pitt and Campbell. Mr. Willis and myself were in control of the bank at the time. If the telegram had been received before the draft I don't know whether I would have complied with the directions to send the draft back or what I would have done with the draft. I do not think I would have sent it back,—I think I would have held it until Pitt and Campbell and Lange had settled their differences or it had been determined by the Court who was entitled to it.

Q. Then you think you would be able to state which course you would have taken, whether you would have paid the draft to Pitt and Campbell, sent it back to Hastings and Lange, or held it?

A. I would have held it.

Q. What would have been the reason for holding it?

A. Not being able to determine to whom we were under obligations to pay it, I would have held it.

Q. Do you recollect whether there was any request



(Deposition of E. H. Whitacre.)

from Lange and Hastings for an extension of time to make the third payment on this escrow agreement?

A. I recollect there was. That request was not granted. Under date of July 16, 1907, I wrote the letter (Exhibit —) in answer to the letter of July 10, 1907, addressed to me by W. C. Pitt. Said letter of July 16, 1907, so far as it relates to this case, is as follows:

**Exhibit — Unsigned Letter to W. C. Pitt, Dated  
Yerington, July 16, 1907.**

“Yerington, Nevada, July 16th, 1907.

W. C. Pitt,

Lovelock, Nevada.

Dear Sir:—

I still have inquiries from Oakland regarding the extension of the option, and will inform them that no extension can be had.

very respectfully yours,

\_\_\_\_\_,  
Assistant Cashier.” [93]

Cross-examination.

The figures on the registry receipt “4-30-1907” represent the date April 30, 1907, and correctly represent the date of the receipt of the registered letter by the bank from Hastings and Lange.

Q. Upon receipt of that letter what did you do with respect to the draft?

A. We credited it upon the escrow and issued certificates of deposit. We issued two certificates of de-

(Deposition of E. H. Whitacre.)

posit, one to Campbell and one to Pitt, for \$5,625.00 each.

WITNESS.—(Continuing.) The draft was payable to the Lyon County Bank.

We did not credit Pitt and Campbell on the books but issued certificates of deposit to them. I believe it is the fact that we received on April 29th the letter notifying us of the forwarding of the draft in the registered letter, and that on April 30th the registered letter reached the bank. The certificates of deposit were issued to Pitt and Campbell before the message in evidence, marked Exhibit No. 3, was received.

On May 2, 1907, the Lyon County Bank sent from Yerington to Hastings and Lange at Oakland the message in evidence and marked Exhibit No. 8. I know of no telegram sent to William Mangen, Jr., by the Lyon County Bank. There was a message sent to William Lange, Jr., on April 30, 1907, similar to the message in evidence marked Exhibit No. 6.

The message in evidence marked Exhibit No. 3 was received by the bank a couple of days after receipt of the draft. [94]

Mr. HODGHEAD.—We now interpose motion on behalf of defendant for nonsuit upon the ground that the plaintiffs have not proven any cause of action against the defendant and have not shown any negligence or any failure to perform and discharge its duty under the contract in sending his message.

(Testimony of R. H. Collins.)

Whereupon the Court denied said defendant's motion for a nonsuit, to which denial said defendant duly excepting, being

**DEFENDANT'S EXCEPTION No. 3.**

**DEFENDANT'S TESTIMONY.**

**Testimony of R. H. Collins, for Defendant.**

R. H. COLLINS, witness called on behalf of defendant, being first duly sworn, testified as follows:

I reside at Sacramento. Am employed by the Union Oil Company. On April 29, 1907, I was in the employ of the Western Union Telegraph Company as an operator at Reno, Nevada. I was a day operator but was often assigned to night work. I was assigned to two or three wires. The wire from Reno to Wabuska was one of them. In sending messages the operators endorse check marks upon them indicating by whom the messages are sent. I recognize the message now shown me as the Reno relay copy of the message from Lange and Hastings to the Lyon County Bank at Yerington, dated April 29th. The pencil markings at the top show the sending. They are all in my handwriting.

Q. At what time did you enter those markings upon that message?

A. From the writing here it was 9:56 P. M.

Q. You mean you sent that message from Reno to Wabuska?

A. Yes, sir. I entered the markings on the message right at that time.

An operator uses the instrument with one hand

(Testimony of R. H. Collins.)

and enters the check marks with the other. These check marks on this message [95] which were made by me at the time, are as follows: "No. 33, W. A. G. 9-56 P, C N."

33 means that that was the 33d message sent to Wabuska that day. W. A. is the call for Wabuska. G. is the operator's initial that O. K.'d the message receiving it at Wabuska. 9-56 P. is the time that it was sent and C N means myself. All operators have a sign.

Q. What does the letter "G" mean?

A. The man who gave me the O. K. on the message at Wabuska when he received it.

Q. That is the operator at Wabuska?

A. Yes, sir.

Q. Can you state from that message what time you sent that message from Reno to Wabuska?

A. 9:56 P. M., as it is marked there.

Q. On what date?

A. On the same evening; it must have been the same evening of April 29th.

Q. You mean that message reached Wabuska at the same time you sent it? A. Surely.

Q. Were you operating directly from Reno to Wabuska? How do you call the operator at Wabuska or at any other point?

A. You call W A; that is the call for Wabuska.

Q. Do you get the answer before you begin the sending of the message? A. Yes, sir.

(Testimony of R. H. Collins.)

**Q.** Do you know what office you are sending the message to?

**A.** Why, sure, you are supposed to.

The said relay copy of said message, with the markings thereon, was then offered and read in evidence, and marked Defendant's Exhibit "A" and reads as follows: [96]

**Defendant's Exhibit "A"—Telegram Dated Oakland, April 29, 1907, Hastings and Lange to Lyon County Bank.**

"RECEIVED AT Reno Nevada

33 W A G 9.56 P C N

360 xn CC BY

21 paid via Wabuska. 2 extra.

Od—Oakland Cal. April 29 1907.

Lyon County Bank., (deliver immediately).,

Draft mailed you Saturday under mistake do not pay any sum to Pitt or Campbell return draft letter follows.

HASTINGS and LANGE

9.29 P. M

Reno Relay"

Cross-examination.

There were several wires I worked on at different times in the Reno office. One was from Reno to Wabuska, and places between.

**Q.** Was Wabuska the terminal of that wire?

**A.** I could not say.

**Q.** You don't know of your own knowledge whether that wire went beyond Wabuska or not?

**A.** No.

(Testimony of R. H. Collins.)

Q. Is it not a fact that you have sent messages over that same wire to points beyond—such points as Mina? A. Oh, yes, I have sent messages to Mina.

Q. Over that same wire?

A. I would not call it that same wire. I would not want to say that it was on that same wire. No.

Q. Would you say you had never sent any message beyond Wabuska on that wire? A. No.

The COURT.—Was it the same line that ran to Goldfield and Tonopah? [97] A. No, sir.

Q. You could not get to Goldfield or Tonopah on that wire? A. No, sir.

Mr. POORMAN.—Q. Do they run separate wires to each office?

A. The wire that went to Wabuska did not go to Goldfield or Tonopah; you could not get Tonopah or Goldfield on that wire any more than you could have gotten New York on that wire.

Q. You know you could not get points between Reno and Wabuska and on beyond Wabuska on that wire? A. I would not say beyond Wabuska, no.

Q. Do you know the size of Wabuska?

A. Yes.

Q. Do you mean to say that the Western Union Company operated a single wire between Reno and Wabuska? A. Oh, no, there were several places.

Q. That is what I am getting at; there was places beyond Wabuska that that wire tapped?

A. I could not say that. I have not been over the ground. I don't know whether it went beyond Wa-

(Testimony of R. H. Collins.)

buska or not. There are several places on that one wire, I know that.

Q. Isn't there any combination between the wires—is there no way of connecting up any of the wires so that by operating at Reno the so-called Wabuska wire you could have called up Goldfield or Tonopah?

A. I don't know how you could have done it.

Q. Do you know that you could not do it?

A. Yes, I do; because that wire don't run towards Goldfield or Tonopah.

Q. Would there be any way of making a connection of the wires so that the message could go to Goldfield or Tonopah? A. Not to my knowledge.

Q. Did you ever operate the so-called Goldfield-Tonopah wire? [98]

A. No, sir, not to my knowledge. There were other men working on that.

Q. What were the other wires you worked on?

A. One was to Lassen County, one to Winnemucca, Lovelocks, Salt Lake, Carson, Virginia.

Q. You never worked on the Tonopah-Goldfield wire?

A. I have no recollection of ever working on the Tonopah-Goldfield wire.

Q. Were they one wire?

A. So far as I know they were.

Q. You say you did extra night work as well as day work?

A. Whenever they asked me to come back in the evening I did so.

(Testimony of R. H. Collins.)

Q. You didn't have any regular wire to operate on for your night work?

A. No, sir, I was working from one wire to another to clean up the business.

Q. Can you tell whether it would be possible for an operator at any intermediate point on a wire or at a point beyond that to which a message is destined, to take a message off the wire, although that was not his call that had been sent in; in other words, could not a man cut on to a wire at any point where the wire passed?

A. If the wire went through that particular office he could, yes.

Q. He could answer you, when you called "W A" and you would have no means of knowing definitely that that W A was the actual man at Wabuska, would you?

A. No; but when you call Wabuska it is not likely that New York or any other place would answer to take the message.

Q. I am talking about points on the wire. Is it not possible for a man to cut in at any point on the wire and answer you as [99] though he was Wabuska and you couldn't tell that it was not Wabuska?

A. Well, until I send the message he does not O. K. it.

Q. But he O. K.'s it at the same moment the message is finished? A. Yes, sir.

Q. So whoever it is that received the message can O. K. it back and you have no actual knowledge that



(Testimony of R. H. Collins.)

the man who took it was the man at Mina or the man at Wabuska?

A. I have no other way of knowing it except as I have told you.

Q. You sent that message out at 9:56?

A. That is what is marked on the message, yes, sir.

Q. You have no independent knowledge of that?

A. No.

The message was delayed at Reno from 9:29 to 9:56 P. M. because we could not raise the operator at Wabuska, that was probably the reason. We keep calling different stations so as to get the business off. Probably the operator was not in and when he answered we sent it.

Q. Do you know whether Wabuska was a night office or a day office at that time?

A. It must have been, or he would not have received it at that time.

I have sent other messages to Wabuska I presume at night. I worked on the wires there. Wabuska is on the road to Tonopah and Goldfield. There was no relay between Wabuska and Reno. There was no relay whatever on the so-called Wabuska wire. In using the wire from Reno on toward Wabuska I did not have to have a message relayed at any point. I don't know whether the Tonopah and Goldfield wire had a relay on it. I have seen men go over there, and get directly Goldfield or Tonopah so I suppose there was no relay.

Redirect Examination.

Mr. HODGHEAD.—Q. When you sent this mes-

(Testimony of R. H. Collins.)

sage to Wabuska, [100] did you get the O. K. on it?

A. The rule is that all messages sent are supposed to be O.K.'ed by the receiving operator.

Q. Have you ever entered your check marks on these messages before you got the O. K.?

A. No, sir.

Recross-examination.

Mr. POORMAN.—Q. You say that it was the custom to receive an O. K. on messages. What does that mean exactly?

A. That the receiving operator has got the message as I sent it out.

Q. He does not repeat the message? A. No.

Q. He simply says what?

A. O. K. and this man who received it signed "G."

**Testimony of Edward B. Harrington, for Defendant.**

EDWARD B. HARRINGTON, witness called on behalf of defendant, being first duly sworn, testified as follows:

I am employed by the Western Union Telegraph Company. I talked with Mr. Poorman in the course of the investigation of this claim by Lange and Hastings growing out of the message in suit. It was about eight years ago and I have not as good a recollection of it as if it had occurred a short time ago. Mr. Poorman, in speaking about the matter with me, said that he understood that the message instead of being sent to Wabuska was sent to either Tonopah or Goldfield and as a matter of fact did not

(Testimony of Edward B. Harrington.)

go to Wabuska or to Yerington. I had the file of papers with me at the time and including the relays and original message, and I think, in fact I am quite sure that at the time I spoke with Mr. Poorman I had the relays, the original message and the services all relating to the transaction, and I pointed out to him the markings on the relays and on the original message and told him that I thought they conclusively showed that the message was not sent by Goldfield or [101] Tonopah but the markings showed it was sent by Reno and Wabuska. I never had any information that the message had gone to Goldfield or Tonopah, and I do not believe I ever made such a statement, because I could not upon the face of the papers. I was thoroughly familiar with the markings of different offices and operators, and there was nothing to show that Goldfield or Tonopah were connected with the message.

Cross-examination by Mr. POORMAN.

I am not positive I showed you the Reno relay. We discussed plaintiffs' claim for damages.

Q. Do you remember my stating that the information I had from the operator was that the message had not gone to Wabuska but had gone to—let us assume that I said Tonopah, and you answered “No, it did not go to that place,” and you named the other place?

A. No, I don't remember saying anything like that, Mr. Poorman. The only thing I could speak from definitely was from the records of the messages

(Testimony of Edward B. Harrington.)

themselves and those markings are the same now as they were then and showed that the message went via Reno and Wabuska.

Q. Did you have the Wabuska copy?

A. I am quite sure I had all the copies with me.

Q. The Wabuska copy. Will you kindly produce the Wabuska copy?

The COURT.—Where is the data that you showed, Mr. Poorman? Have you got it here?

Mr. HODGHEAD.—These are the records that are in evidence.

Mr. POORMAN.—I am asking for the Wabuska copy. I am asking you to produce the Wabuska copy.

Mr. HODGHEAD.—I don't think we have it.

A. We have a duplicate to show it was there on the 2d.

Mr. POORMAN.—Q. I mean a message that went through and got [102] to Wabuska on the 29th or the 30th of April.

Mr. HODGHEAD.—I don't think we have it.

The COURT.—Your record should disclose whether that message was received there on the night of the 29th.

Mr. HODGHEAD.—The Reno record shows it was delivered there.

The COURT.—Well, that is the trouble; you ought to be able to show by your operator at Wabuska that it was received there that night.

Mr. HODGHEAD.—We have not got the records at Wabuska; we cannot produce them.

(Testimony of Edward B. Harrington.)

The WITNESS.—Your Honor, what I meant was that we had the Wabuska records as far as we had them; that is a copy of what appeared to me to be—

Mr. POORMAN.—Just a moment. I object to that. The record is the best evidence.

The COURT.—Whatever record you showed Mr. Poorman you have, have you not?

A. Yes, sir.

The COURT.—Produce that.

Mr. HODGHEAD.—That message is in evidence, the original message and the Reno copy which was just introduced. The stipulation covers the fact that the message reached Reno.

Mr. POORMAN.—I want the copy taken by the operator preparatory to sending it to Yerington, or the operator himself.

Mr. HODGHEAD.—The operator is not to be found.

Mr. POORMAN.—Q. Then you have not a record of anything, excepting this message; the message of April 29, 1907, you have nothing touching that message, as to the records of your company at Wabuska?

A. I think that Mr. Hodghead has some statement from the manager—

Q. No, I want the record that is kept at Wabuska. [103]

The COURT.—This witness has told you several times he has not got them. That is all that is necessary.

(Testimony of Edward B. Harrington.)

Mr. HODGHEAD.—We have the statement from the Wabuska operator that he did receive it. \* \* \*

Q. The original writing that this operator at Wabuska made when the message was received, you have not seen it? A. No, sir.

The COURT.—Mr. Hodghead, if you have that statement why couldn't you get his evidence?

Mr. HODGHEAD.—The matter dragged along for quite a while, your Honor.

Mr. POORMAN.—The claim was within 60 days after the sending of the message.

Mr. HODGHEAD.—Yes, and then it lay dormant for a year or two.

The COURT.—It seems to me it is a very material thing for you to show when it was received at Wabuska.

Mr. HODGHEAD.—We think the evidence proves that.

The COURT.—That is a mere inference. You can understand distinctly that is not the most satisfactory evidence.

WITNESS.—(Continuing.) I don't know of my own knowledge what occurred with respect to the transmission of this message to the Wabuska office. My investigation occurred in the latter part of 1907, it seems to me, or the beginning of 1908. I was afforded every facility by Mr. Poorman to investigate this claim.

Q. Did you ever go to Tonopah or Goldfield in this connection? A. No, sir.

Q. Didn't it occur to you, after I had stated that

(Testimony of Edward B. Harrington.)

we had information from an agent of your company that it had gone to either one of those points, that the most natural thing in the world would be to investigate the company's records at both of those points? [104]

A. Yes, but from my investigation at the time, there was nothing at the time to show that the message ever went to Goldfield or Tonopah, and I did not consider it necessary to go to the expense of an extra trip to those two points. I went to Reno and Wabuska and Yerington and Elko.

Q. Did you ever find any place that the message went to on that night of April 29th?

A. Well, outside of Reno, I didn't find anything.

Redirect Examination.

Mr. HODGHEAD.—Q. I have a report here which is dated March 11, 1909. Is that about the time you made an investigation of this case?

The COURT.—Can you explain why claims of this kind are permitted to run for years before they are taken up for investigation?

Mr. HODGHEAD.—As a matter of fact, this investigation was delayed for a while after the claim was made.

A. This report was made in March, 1909.

I have nothing to do with the sending of messages as an operator. My report and my talk with Mr. Poorman was based upon the records we had at the time I made it.

**Testimony of William Quinn, for Defendant.**

WILLIAM QUINN, witness being called for the defendant, being first duly sworn, testified as follows:

I live in Oakland, and am employed by the Western Union Telegraph Company in its office there. I was so employed on the 29th of April, 1907, being the receiving clerk who received this message from Mr. Hastings and Mr. Lange on that date, addressed to the Lyon County Bank. I remember the circumstances of Mr. Lange or Mr. Hastings, or both, calling in respect to the message the next day after the message was received and of their telling me of the character or nature of the message at the time it was offered [105] for transmission. They stated they wished to file a message to Yerington, Nevada; that it was necessary for that message to reach Yerington before the bank opened the following morning. I told them that to the best of my knowledge the office was closed at night both at Wabuska and Yerington. I said that as far as I was aware, neither Wabuska nor Yerington was a night office. They said they were anxious on account of a deal involving a number of thousands of dollars to have the message reach the bank the following morning before the bank opened in order to stop payment on a draft. I told them that it was impossible to deliver it that night as far as I knew, my knowledge was that the offices were closed and the message could not possibly get through that night to either point. They requested that I would do the best I possibly could to



(Testimony of William Quinn.)

facilitate its delivery as soon as possible. I told them I would do this, but under no circumstances could I guarantee the delivery in any case—in any case I could not guarantee the delivery of the message at any time because my authority did not permit me, and the company's rules are very strict on that point, that the delivery of messages must not be guaranteed; they asked me what I could do to hurry it and I told them nothing would hurry it that night, that the message would be delivered the following morning; that if I inserted the two words if I placed the word "Rush" on it it would probably have no effect because the word "Rush" was frequently overlooked and no attention was paid to it, but I considered that if the words "deliver immediately" were inserted in the message, that on the opening of the office the following morning in Wabaska the operator would see that the message was delivered immediately. I told them the charge for those two words "deliver immediately" would be additional.

Q. That is, that that would be included in the charge on the message? [106]

A. Included in the charge on the message, and they would be additional to the text of the message as it originally read and as they brought it in to me, and I would charge them for those two words. The amount of the message should have been 98 cents. We used no pennies in the office at that time and to the best of my knowledge and belief I charged them one dollar. That was the actual amount I received

(Testimony of William Quinn.)

from them to the best of my knowledge and recollection. I wrote words "deliver immediately" on the message in their presence.

The suggestion to write the words "deliver immediately" on the message for the purpose of hastening its delivery was accepted by them. They assented to that plan. I myself wrote the words "deliver immediately" in pencil upon the message, which was typewritten. The charge for the message included these two words added.

I said nothing whatever to Mr. Hastings or to Mr. Lange, or to either of them, at that time about insuring or guaranteeing the delivery of the message. My position in the company was receiving counter clerk. My duty was to receive telegrams at the counter. I am familiar with the rates. The rate to Wabuska was 40 and 3; 40 cents for 10 words and 3 cents for each additional. The rate to Yerington was a flat rate of 25 cents over the other line. 90 cents was the total rate on this message—the Western Union rate to Wabuska and the telephone rate from Wabuska to Yerington. I mentioned the Wabuska office because that was the terminus of the Western Union line. I told them our line extended to Wabuska. The message would be carried over our line as far as that point. Beyond that we turned it over to another company which was a telephone company as far as I knew that was not ours, and we could not guarantee them anything beyond our own line. I got the information from our tariff book. A flat rate means a fixed charge regardless of the

(Testimony of William Quinn.)

number of words. I told them that [107] if the words "deliver immediately" were written on the message that there would be an additional charge. I remember Mr. Lange came to the office the next day. I came on duty about eleven o'clock, and had been on duty but a short time when Mr. Lange appeared and asked if there was a reply to the message. I found there was not and so advised him.

Q. Do you recollect whether you stated to him that the message had not been repeated?

A. Not at that time.

Q. Or reported?

A. Not at that time; it had not been reported on nor was there a reply. That was what I stated to him at the time. There was no reply to the message nor have we received a notice of nondelivery.

Q. This was an unreported message, was it?

A. It was an unreported message.

Q. Would you expect to have it reported if it was an unreported message? A. No, sir.

The COURT.—The witness said the message had not been repeated.

WITNESS.—(Continuing.) I remember Mr. Lange called again the same day and asked again if there had been a reply received. I believe Mr. Hastings or some other individual was with him, but I am not positive who it was. I told him there had been no reply received and no notice of nondelivery. I believe he called a third time on that same date. I am not positive of that, but to the best of my recollection he called the same night. Both Mr. Hast-

(Testimony of William Quinn.)

ings and Mr. Lange came in the following morning and inquired what had been done about the message. I told them we had no reply and no notice of non-delivery and as far as I knew the message had been delivered or we would have received a notice to [108] the contrary. He said, "Well, it is up to you to do something about this, that message was an insured message and we paid for it and we expect you to give us service." I told him that the message was not an insured message, that it was an ordinary message, and I did not feel that it was up to us to secure a reply to the message. If it had been undelivered, we would have been notified to that effect. Beyond that I said I had no authority to do anything further. He said: "The message was insured and I think you should do something about it."

I told him the message was not insured. To show him the message was not insured I inquired the amount of toll he had paid. I was not any more familiar with the amount at that time—with the tolls—he had paid than I was with the message that was filed previous to that, or the message filed after that; his message was just an ordinary message so far as I was concerned, it had no more interest to me than any other message, and for that reason I asked him the amount of tolls he had paid on it, in an effort to show him it was not an insured message. He replied the toll paid was 1.45. I said, "I am sure you are mistaken in that." He showed me previous to this his copy of the message. Our

(Testimony of William Quinn.)

copy was in the bookkeeping room in the files. I had not access to it at that time. He showed me his copy and I computed the amount of the tolls as they should be and explained to him that he must be mistaken as to the amount he paid, that \$1.45 was not the correct amount by any means. He said that was the amount he paid. I told him one dollar was the correct amount, or 98 cents was the correct amount; I felt sure he had not paid anything in excess of that amount. He said, "Well, I did, and it is up to you to do something about it." I said, "I don't know what I can do about it unless I remit to you the amount in excess of one dollar." He said, "Well, I want something done about it, we want a reply, and something must be done about it." I then again offered to refund [109] the amount in excess if he felt positive I had overcharged him. I considered that I was doing the right thing to offer to refund the amount or remit the amount to him. I didn't feel certain that he had paid an excess amount at all at any time. Not being able to confirm it I had to take his word for it and I was simply willing to adjust an error if one had been made so far as I was concerned.

The COURT.—Q. You would not take an individual's word for a matter of that kind, that they had paid an excess upon a message without going to your records and finding out what had been paid, would you?

A. I would not have remitted the amount or would not have refunded the amount to him until I had

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(Testimony of William Quinn.)

ascertained that he had actually paid the amount. I told him I was willing to refund the 45 cents if I was satisfied. I had to satisfy myself first that he had paid it.

Q. You made your offer to refund contingent; then did you go and try to ascertain?

A. I did, but I could not find the message. The message was in the bookkeeping rooms and I had not access to it. The bookkeepers were all working on it. The way the business was handled at that time it was next to impossible for me to locate the message.

Q. Is it an office of large business?

A. At that time it was, yes, sir.

Q. Where was the office?

A. It was located in Oakland. The business that was filed there was large for the force to handle. It kept them very busy during the time they were working on it.

Q. It was a systematized office, was it not?

A. Yes, sir.

Q. You could tell who had the message? [110]

A. I knew the bookkeepers had it.

Q. Couldn't you go and look at the message and see the amount noted on it that was paid?

A. I could when it came from the bookkeepers; it had to be checked up by them before I could get it.

Q. Why did you offer to repay him without knowing whether he was entitled to be repaid?

A. I only offered it on condition that he had paid

(Testimony of William Quinn.)

me that amount; I was not at all sure that he had.

Q. You said you went and looked and could not find the message; did you come back and tell him so? A. Yes, sir.

Q. And you told him you could not repay him until you had an opportunity to find out?

A. Yes, sir.

I recognize the paper shown me, being Plaintiffs' Exhibit 3 as the message filed. The words "deliver immediately" were written by me, also the check marks which show that the message was filed at 8:50 P. M. The number of words, including "Deliver immediately," is 21. The words "via Wabuska" are also in my writing. I told Mr. Hastings and Mr. Lange that if I had made a mistake I was willing to rectify it in regard to the tolls.

Q. Did you at any subsequent time tell them you would refund the excess if there had been any excess?

A. I don't recollect that I did. Mr. Lange called again when the reply to this message was received.

Q. Was anything further said about this difference in tolls of 45 cents when he called at that time?

A. I don't think there was. I am not positive about that.

I never went out of the office to see Mr. Lange or Mr. Hastings at any place and offered to make a return of the 45 cents. I remember at the time the message was filed and after they asked [111] me if it could get through that I went into the back room. I went to ascertain if the line from Wabuska

(Testimony of William Quinn.)

to Yerington was up, that is in working order, that is the telephone line. The information I got was that it was O. K.; that is we had no report that it was not working.

Q. Did that mean that it was working that night?

A. That it was working at the time I asked the question. We had no report of its being down at that time.

Q. You say you had no report of its being down; in regard to Yerington being a night office, did you get any information about that, or in regard to Yerington not being a night office?

A. My knowledge was that it was not a night office at that time, that the office closed at 8 o'clock; also that the Wabuska office was closed. \* \* \*

The COURT.—Q. When you went into the back room that evening you did not ascertain then that the office was not a night office, but you say you had that knowledge before that it was not a night office?

A. Yes, sir.

The COURT.—Q. You simply went into the back room to ascertain whether the line was up, as you term it?

A. From the operator, yes, sir.

Regarding tolls, I could not now state whether I received more than \$1.00, but to the best of my knowledge I did not. If the message had been a repeated message the regular toll would have been \$1.47, but if it had been a repeated message the words "deliver immediately" would not have been on the message,



(Testimony of William Quinn.)

the words would have been "repeat back" and the toll would have been \$1.37.

Q. Could you state what would have been the toll on this message if it had been an insured message?

A. No, I could not, I have never handled an insured message in my life. [112]

Cross-examination.

The toll on the message as an unrepeat message would have been 98 cents. We did not use pennies at that time so the amount actually paid would have been \$1.00. If the charge were \$1.47 they would have paid \$1.45. I don't know of any change in the rates on the telephone line during the month of April although there were occasional changes at different times on the telephone line. I don't remember the coins in which the payment for this message was made. Neither Hastings nor Lange demurred to the amount of the charge. They paid whatever was asked. I remember Mr. Lange calling at the office but do not remember Mr. Poorman. I do not recollect at all any statement by Mr. Poorman to the effect that plaintiffs had made a definite contract with defendant and would take back no money. Mr. Lange to the best of my recollection acted as spokesman the whole way through. The only conversation I had was with Mr. Lange to the best of my knowledge. At that time I did not know that Mr. Lange was hard of hearing. I only learned that yesterday. I addressed him as I would anybody else.

Q. You were reasonably close to him at all the times you did address him?

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(Testimony of William Quinn.)

A. Oh, yes, just across the counter.

The Wabuska office was in the class that would be closed at eight o'clock. That is simply my knowledge of what that class of offices usually did. I don't know as a matter of fact whether Wabuska was an office that was an exception to that rule. I knew that the Western Union office was kept in the Southern Pacific Company's office at that point, and that most of the trains went through there during the night but no commercial telegraph business was handled ordinarily. I understand that it was optional with the operator to accept it. On occasions messages were sent through. If an operator cared to receive it while receiving a [113] train message, he could go on and take a Western Union message if it was a rush, or for any reason he wished.

Q. Is it not the custom from your acquaintance with the telegraph business, that when an office is about to close for the night and an important message is offered for transmission to find out whether it is not possible to hold that office open for a few minutes and to crowd through the message?

A. It would be impossible; from our office in Oakland a thing like that would be impossible. A message would have to go from Oakland to San Francisco from San Francisco to Reno, and from Reno to Wabuska in this particular case, and from Wabuska again to Yerington, which would mean several relays at each of the points I have named, and it would be impossible to get a message through in the ordinary course of business in a few minutes, in fact prac-

(Testimony of William Quinn.)

tically under 30 minutes; under ordinary circumstances it would not be possible in less time than that.

Q. Do you know of your own knowledge about what time would ordinarily be taken, assuming all offices to be open, and only the ordinary amount of traffic on the line, how long it would take for a 21 word message in plain English to be transmitted from your Oakland office, the one you were in charge of, to Yerington?

A. To the best of my knowledge it could not get through in less than from one to two hours—one hour at least is the time I would consider.

Q. Is it not a fact that messages have frequently been transmitted between those points in less than half an hour?

A. It depends on the volume of business ahead of us.

Lange and Hastings explained the urgent circumstances of the message. It was a matter of receiving the message so far as I was concerned; it was not the urgency of the message that had any concern with me. People file messages and they are all more or less urgent, and they have their own reason for wishing you to [114] rush them. So far as this particular message was concerned, it probably did—and I think it did—make very little more effect on me than the one preceding it and the one that followed it. It practically went in one ear and out the other.

Q. Is that the way the Western Union Telegraph Company transacts its business?

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(Testimony of William Quinn.)

A. They treat everybody alike.

Q. They do? A. Actually they do, yes, sir.

Q. So it would not make any difference whether we stood up there and told how urgent it may be?

A. I would treat you courteously. It would take its turn in regular order. It would not be put ahead at all. Simply because you wished it put ahead it would not be put ahead, if you requested to do so. I might as a matter of courtesy do that.

The COURT.—Q. Does that depend on a matter of courtesy?

A. Whether it the message is put ahead or not?

Q. Yes. A. Yes, sir.

Q. That is not treating the public alike, is it?

A. By courtesy, I mean if they urged that the message must be put ahead and give good reason for doing so the message would be put ahead; that is, I would personally take a message and put it ahead if they gave me sufficient reason for it.

Q. Does the company authorize that sort of thing?

A. No, sir, that would be optional with me.

Q. Does the company authorize you to use your optional discretion in that regard? A. No, sir.

The COURT.—That would be a very singular thing if the public was at the mere whim of the receiving clerk.

Q. Do you mean to say there is no method under which a [115] message which is in fact urgent can have a right of way over ordinary messages? Is there any classification of messages for the purpose of sending them?

(Testimony of William Quinn.)

A. This was only an ordinary message, your Honor.

Q. You are arguing with me. I say is there any classification of messages as to their relative urgency which entitles them to a relative right of way?

A. No, sir.

Q. If I came into your office and handed you in a message addressed to some friend in Sacramento that said, "I will try and be in to dine with you to-morrow night," that message would have just as much right of way as one announcing a death or a fatal illness, or anything of that kind?

A. The company's instructions are to put those messages ahead.

Q. But it is a mere matter of discretion with the receiving clerk, to use his judgment as to whether it is entitled to be put ahead, is it?

A. I don't think the company makes a ruling on it.

I do not perform other acts in connection with the transmission of messages such as putting them ahead. I simply take the message in, I don't transmit it. I take it in and put it on the receiving hook; the operator sends it, I was not the operator; I was simply the receiving clerk.

Mr. POORMAN.—Q. You were the person who dealt with the public in accepting messages?

A. Yes, sir.

Q. So they could look alone to you in the matter of urging speed in respect to the message?

A. Yes, sir.

Q. Or dealing with respect to a repeated message?

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(Testimony of William Quinn.)

A. Yes, sir.

Q. Or an insured message?

A. Not insured messages, no, sir; I would not accept an insured message. [116]

Q. You would not?

A. No, sir, I would not at that time.

Q. You are familiar with the terms on the back of the telegram, are you? A. Yes, sir.

Q. You know that they provide for the insurance of some messages? A. Yes, sir.

Q. And you would not accept an insured message although you were authorized by the company to do so? A. No, sir.

Assuming that the Wabuska and Yerington offices were night offices, the message in question would, in the absence of any special agreement regarding urgency, be sent through at 8 o'clock the next morning from Reno.

Q. You have heard the testimony that the message left Reno at about 9:56 the previous night?

A. Yes, sir.

The COURT.—Q. That is, it was relayed to Wabuska?

Mr. POORMAN.—It was relayed from Reno.

The COURT.—Yes. I am not holding that it went to Wabuska. I mean that it was relayed at Reno for Wabuska.

Mr. POORMAN.—Q. You have no reason to doubt but what it was sent at that time, have you?

A. No.

Q. So that the Wabuska office must at that time

(Testimony of William Quinn.)

have been believed to be open at least by the operator operating at Reno? A. Yes, sir.

The COURT.—Q. If the message was O. K.'d under your system by the right man at Wabuska, it was bound to have been received there at that hour, wasn't it, 9:56 at night. I suppose the appreciable time between the sending and the receiving is very slight, isn't it?

A. Yes, just the time the operator requires in sending it.

Q. Assuming the Wabuska office not to have been a night office what time would it arrive in the morning?

A. Eight o'clock. I know of no reason in the operation of [117] of the Wabuska-Yerington telephone line why a message of this nature would not go out immediately at eight o'clock in the morning, if it arrived at Wabuska the night before. I am now working for the Company.

I didn't state in my testimony that I said to Hastings and Lange at the time of the sending of this message that I could not guarantee delivery except over the Western Union lines. I could not guarantee the delivery of a message over our line or over their line. I could not guarantee the delivery of any message.

Q. You remember the stipulation on the back of the telegraph blank regarding repetition, don't you?

A. Yes, sir.

Q. Is not your company accustomed to receive messages known as repeated messages, that is, tele-

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(Testimony of William Quinn.)

graphed back to the sending office for comparison, for which an extra half rate is charged?

A. Yes, sir.

Q. And you are aware are you not, that the telegraph stipulation reads "to guard against mistakes or delays, the sender of the message should order it repeated, that is, telegraphed back to the originating office for comparison"?

A. Yes, sir.

Q. How is it you did not, when Hastings and Lange put themselves in your hands and requested you, as you stated, to do the best you could, how it is you did not say to them that they should have this message repeated?

A. Because it was going over another line other than ours, and if I made that statement it would have had no value. The company assumes responsibility on its own lines, not on other lines.

Q. You do not think that the repetition of the message from Wabuska back to Oakland would have had any tendency to assure a delivery of that message? A. I do not. [118]

Q. It would at least have advised Hastings and Lange, would it not, that the message had got to Wabuska?

A. No, sir, it would not have advised them of that.

Q. Do you not notify people who send repeated messages? A. No, sir.

Q. You notify them if no repetition comes back, don't you?

A. We would notify them only in case of nonde-



(Testimony of William Quinn.)

livery upon receiving a notice to that effect.

I did not make any suggestion respecting the repetition of the message.

The COURT.—Q. I would like to ask you this, Mr. Quinn: assuming that the testimony that has been given here on behalf of the plaintiff that they paid you \$1.45 for that message, upon what theory, according to your testimony, was that sum paid? If you are correct that there was no guarantee or insurance of the message, wasn't it for a repeated message?

A. There is no way by which I can compute the tolls that I can arrive at that amount in any way. I computed myself afterwards to see if that amount was possible, and I could not see it; I concluded that there could be no way of getting that.

Q. You are going off upon the theory that you could not have been mistaken. I say assuming that you are mistaken, and that they are correct that they paid you \$1.45 for sending that message, that was just the figure for a repeated message, according to your testimony?

A. It would not have been actually the amount for a repeated message unless you include the words "deliver immediately."

Q. It had those words in it, you wrote them in there yourself? A. Yes, sir.

Q. You see the human mind does not always work perfectly; you might have started out upon the theory that you would put those [119] words in there and then you might have said to them it would be well to have it repeated and then they would have paid

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(Testimony of William Quinn.)

that \$1.45 exactly, would they not?

A. Yes, sir.

Q. The thing that strikes my mind is this: \$1.45 is an odd figure, it is not like \$1.50, it is not like \$2.00, it is not like \$1.00; men come here and testify that they paid precisely \$1.45 for the transmission of this message; now, assuming that to be true must it not have been either for a repeated message or for some other assurance that they were given?

A. Yes, sir.

We do not ordinarily upon receiving messages for transmission go into the bank office to see if the line is up unless it is going over other lines than ours or unless it is a line that is ordinarily subject to being up and down as, for instance, the Eureka wire, which goes through a rough country. In that case, we look to see if it is up before we accept the message.

Q. You were satisfied before you accepted that message for transmission, were you not, that the line was up and that you could safely undertake to transmit the message?

A. We had no notice to the contrary.

Redirect Examination.

I said that I might get a message to Wabuska although it was not a night office if the operator would take it. At the Oakland office the bookkeeping was not carried on all night, but was carried on the day following the sending of the message. It is conducted in the rear apartment in the same building.

(Testimony of William Quinn.)

Mr. POORMAN.—Q. Would it have been an impossible matter or a highly inconvenient matter to examine that message at the time Mr. Lange called upon you respecting the amount of tolls and the dispute on that point. [120] A. Yes, it was.

Q. It could have been done, however?

A. It could have been done with considerable inconvenience. In the ordinary course of business it could not have been done.

Q. What do you mean by "considerable inconvenience"?

A. You would have to stop the business of the bookkeeping room in order to locate that one message.

Q. Don't you think a message concerning which a controversy of this nature has arisen, where the amount involved is \$11,250, would justify you in finding out immediately what the exact nature of the charge was?

A. It would if I had been aware of all the facts that have since transpired. At that time, as I have before stated, the message to me was the same as any other message; I was not aware of it, that all this was involved.

The COURT.—I thought you said they told you so?

A. They did, but I did not realize just the exact nature of the message. It was customary for people to make exaggerated statements in filing their telegrams—

(Testimony of William Quinn.)

Mr. POORMAN.—Q. Everybody's troubles are the worst on earth, I suppose? A. Yes, sir.

It is possible I made a mistake in computing the charges on this message. If in fact overcharge was made through mistake the receipts of the office at that time would show it.

**Deposition of H. Hironymous, for Defendant.**

Deposition of H. HIRONYMOUS, taken under a commission issued out of court upon the stitution of the parties:

H. HIRONYMOUS, called as a witness for defendant, being duly sworn, testified as follows:

I reside at Yerington, Nevada, and resided there during the months of April and May, 1907. At that time I was manager [121] of the Yerington Electric Company, which owned the telephone line between Wabuska and Yerington, Nevada. It received and transmitted telegraphic messages over the telephone line between those two points. The Western Union Telegraph Company had no office at Yerington at that time. The nearest office was at Wabuska. Telegrams received at Wabuska from any place and directed to Yerington were carried from Wabuska to Yerington by this telephone line. At that time the office of the telephone company at Yerington closed at 9 o'clock at night. If a message arrived at Wabuska after that hour, there was no way it could be received at this office before next morning. The Yerington office opened for business at seven o'clock in the morning. A

(Deposition of H. Hironymous.)

message which arrived at Wabuska after nine o'clock at night would in the ordinary course of business be received at Yerington the first thing the next morning.

Cross-examination.

I could not say whether the Yerington office remained open on April 29, 1907, later than nine o'clock P. M. That office on occasion during 1907, was allowed to remain open later than nine P. M. It would have been possible to transmit a message such as the one addressed by Hastings and Lange to Lyon County Bank from Oakland to Yerington within less than thirty minutes. We have received them in that time.

Q. Is it or is it not the business custom or practice, when necessary to get a telegraph message through to an office whose hour of closing is near at hand, for the sending operator to transmit notice to the receiving operator to hold the office open pending the transmission of a message which the former operator is about to send?

A. I don't know that we had such a practice, but it was done at times. I don't know how it was with others.

I don't know of anything which would prevent a 21 word message in plain English being sent over the telegraph lines of [122] Western Union Company and the telephone lines of Yerington Electric Company from Oakland to Yerington within 20 or 30 minutes after it was sent from Oakland. Lyon County Bank and its chief officers were well known

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(Deposition of H. Hironymous.)

in Yerington in April and May, 1907. The telephone company operated a local telephone exchange in Yerington and there was telephonic connection between the company's Yerington office and the office of the Lyon County Bank, and between that company's office and the residence of certain of the bank officers. It would have been possible to deliver in writing or over the telephone a message received at our company's Yerington office for Lyon County Bank within less than a minute after the message was fully received.

Q. What was your company's method of delivering messages received by it in Yerington for addressees in Yerington in April and May, 1907?

A. Important messages were sent out by messenger. Parties who had phones were notified by phone that the message was there. If we got them on the phone they would come in and get them. If we did not get them on the phone we would send out a messenger.

If a message for Yerington reached Wabuska after the Yerington office had closed for the night, in the ordinary course of business it would be transmitted to Yerington on the following morning between seven and eight o'clock, if the agent attended to the matter promptly. If a message addressed to Lyon County Bank were received at the Yerington office immediately after its opening at seven o'clock in the morning, it would be delivered in the ordinary course of business as soon as the bank opened, and sometimes before. If on its face it showed urgency

(Deposition of H. Hironymous.)

and was directed to be delivered immediately, it would be delivered as soon as we could find the parties. [123]

It was here stipulated by the respective parties that W. C. Pitt, one of the parties to the escrow agreement, between Pitt and Campbell and Lange and Hastings, being Plaintiff's Exhibit 1, and one of the owners of the property described therein, if called as a witness in said cause in behalf of defendant would testify that he was one of the owners of the property and that he was familiar with the property and that in his opinion the property subject to the said escrow agreement with Lange and Hastings was of greater value on the 1st of July, 1907, than the sum of \$56,250.00.

Defendant rests.

**Testimony of A. H. May, for Plaintiffs (in Rebuttal).**

A. H. MAY, being called as a witness for plaintiffs in rebuttal, being duly sworn, testified as follows:

I am the District Superintendent of the Western Union Telegraph Company in San Francisco, and was such in April and May, 1907. During the month of April the toll on telegraph messages between Oakland, California, and Yerington, Nevada, as published, was 40 and 3 to Wabuska, that is 40 cents for the first ten words and 3 cents for each additional word, and 25 cents flat for the message irrespective of its length, from Wabuska to Yerington. On the 28th of April a new rate was published as regards

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(Testimony of A. H. May.)

messages passing over the Yerington Electric Company's lines, to become effective as soon as the circular reached the various offices. The new rate over the Yerington Electric Company's line from Wabuska to Yerington was 25 and 2, that is 25 cents for 10 words and 2 cents for each additional word. Respecting the message, Plaintiffs' Exhibit 3, on a basis of 21 words, the toll over the Yerington Electric Company's line under this new rate, would have been 47 cents. The Company does not keep any record other than the temporary retention of the check as to the toll on each message, only on the messages themselves. There is no record of the tolls on each individual [124] message. There is no record kept of the number of words in any particular message. The circular published by the company on the 20th of April announcing the new rate was published in New York City and sent from there to various offices. Our Oakland office would receive that circular generally between the 5th and 10th of the following month.

It was here stipulated that if Bliss and Ruddock, mining engineers referred to by plaintiff Lange in his testimony, were produced and sworn as witnesses in the case, they would each testify that in their opinion the property of the Kennedy Consolidated Gold Mining Company was practically worthless at the date they advised Lange and Hastings as testified to by them, that they had examined the property thoroughly at the instance of Hastings and Lange and that they are competent experts and experi-



(Testimony of A. H. May.)

enced mining engineers. Also that plaintiff Lange, during the two months following the sending of the message, tried to get rid of his contract with Pitt and Campbell so as to leave himself whole or anywhere near whole, and did not succeed.

Thereupon said cause was duly submitted, and on the 24th day of April, 1916, said Court rendered its oral opinion therein directing judgment for the plaintiff, a copy of which opinion is as follows:

The COURT (Orally): This is an action brought to recover damages against the defendant for failure to deliver a telegram. It grew out of a transaction having as a basis a contract between the plaintiffs, residents of California, and parties in Nevada, for the purchase and sale of certain mining stocks. The contract provided for deferred payments.

The immediate transaction out of which the action grows was the sending of a draft for the amount of a payment to a bank at Yerington, Nevada, which was acting as an escrow [125] holder of the stock. The draft was mailed on the 29th day of the month, —April. Immediately after its being sent, the plaintiffs received information, satisfying them sufficiently to act upon it, that the stock was practically valueless, and they thereupon went to the telegraph office in Oakland and tendered a telegram addressed to the bank at Yerington, directing it to withhold payment and to return the draft to them. The date of payment was the following day, the 30th day of the month. They laid the matter fully before the

agent of the telegraph company and submitted to him the question of the most efficient means to insure the prompt delivery of the telegram in time to meet the necessities of the matter, that is, by opening time of the bank on the following morning. After retiring to a back room for the purpose of ascertaining the information, the agent of the telegraph company gave them certain advice as to the proper method of insuring the prompt delivery of the telegram, and stated to them that it would cost them an additional toll, which they very readily paid. This transaction was not in exact accord with the stipulations to be found on the back of the company's telegraph blanks for a "repeated" message, under which the telegraph company holds itself not liable for delays and errors unless the message is repeated. The message was sent upon its way and reached Reno in due course that evening, and within due time was put upon the wires at the Reno relay for Wabuska, Nevada. And there it disappears.

The operator at Reno testified that he got the Wabuska call, but, of course, as he testified, he could not say absolutely that it was the office at Wabuska; it was its call, however, and he transmitted the message accordingly. I should have said that the transmission lines were over the defendant's wires to Wabuska, and from there, through an arrangement had by it with a telephone line running from Wabuska to Yerington, [126] a distance of about eleven miles, their messages were carried to Yerington. Both companies had a common agent at Wabuska, that is, each employed the railroad agent

there as telegraph operator for the defendant on the one part, and on the other the telephone operator of the line between Wabuska and Yerington. The message finally turned up at Yerington on the second day of the following month,—May. The bank had, in the meantime, received the draft, and in ignorance of any desire to intercept it, paid over the proceeds under the contract.

There is no evidence to show or disclose to the mind of the Court precisely what the cause was which failed to produce this message at Yerington within the time when, admittedly, it could have been transmitted. The evidence is wholly uncontroverted, however, as to the fact that had it been transmitted in due course and with ordinary diligence and expedition, it would have reached Yerington certainly not later than between seven and eight o'clock on the morning of the 30th, when the draft was to be received and paid by the bank, which would have been before banking hours. I think the bank at Yerington opened at 8:30 o'clock, but the telephone-telegraph office at Wabuska and the telephone office at Yerington opened at seven o'clock, and, of course, it would have taken but a brief moment to have transmitted this message. But, as I say, it did not materialize at Yerington until the second day of the following month.

The plaintiff has brought suit upon the theory that it is entitled to recover the amount of its draft. The defenses interposed are, first, that the action is based upon a misconstruction of the contract of purchase and sale under which the payment was being

made; in other words, that it was an absolute contract, under which plaintiffs were bound in any event to fulfill or be liable, and therefore that they were not injured by the failure of the defendant to perform its duty in the prompt transmission of the [127] telegram which would have arrested their draft; that their remedy would have been to fulfill the contract and then, if they found that, by reason of the want of value in the stock, they were injured, they could have sued for the damages resulting. It is further contended that there was no negligence on the part of the defendant; that the delay, if any, occurred upon the connecting telephone line. And thirdly, that if there was any delay on the defendant's part, it is not liable, by reason of the conventional stipulation on the back of its messages that it will not be responsible for delay or error in transmission where the message is not repeated, and that this was not a repeated message.

So far as the first defense is concerned, it is involved in a ruling made by the Court upon demurrer, where the same contention was made as to the character of the contract and overruled. Briefly, it grew out of the forfeiture provision contained in the contract which, instead of the usual stipulation that the contract which, instead of the usual stipulation that the contract should be void for failure of deferred payments,—which latter has always been construed as for the benefit of the obligee and not the obligor,—was in substance that, in the event of the failure of any subsequent payment therein stipulated, the rights of the parties “and each of them”

to the contract should be absolutely at an end; and it was held by the Court on demurrer that the Court was not at liberty to put an interpretation upon language so explicit as to the rights of both parties that they could not be permitted to so contract, if they desired. I see no reason to modify that ruling or take a different view of the contract. In fact, there were some features about the subject matter of this contract which might very well have been the inspiring cause of exactly that sort of a provision, having in view the character of the property that they were dealing with; so that I am satisfied that that first defense is not [128] tenable.

As to the second defense, that there was no negligence, I am unable to find that this message, within the time that it should have been transmitted, ever left the lines of the defendant, but that the delay, whatever its cause, occurred on the lines of the telegraph company. There was evidence tending to show that one of its agents had intimated that the message had been erroneously sent to Goldfield or Tonopah, but it is not necessary to say what the cause of the delay was; it occurred upon the lines of the defendant. Ordinarily, of course, it is sufficient, as contended, to show that, in the due course of business, a message left one office upon the line directed to another, under such circumstances as were testified to here, to raise a presumption of receipt at the latter; but I do not think, under such circumstances as appear here; that that showing, in the absence of some more definite evidence that it did in fact reach Wabuska, can be regarded by the

Court as sufficient to show that the telegram did reach Wabuska in due time. There was a very significant failure in defendant's evidence in that respect. The defendant at each of its stations keeps a record of all messages transmitted and received. That record from the office at Wabuska was not produced at the trial, nor was the evidence of the then agent at Wabuska produced,—I have forgotten what the occasion was,—there was some reason for it,—but it matters not. It was incumbent upon the defendant to trace that message out of its hands and into that of its connecting carrier,—assuming that the relationship between the defendant and the telephone company, which was an unusual one, was such as would have excused the defendant for a delay occurring upon the telephone line. But, as I say, the evidence does not satisfy me that the message ever reached Wabuska, that is, that it ever reached there in time; so that I am quite satisfied that there was [129] negligence on the part of the defendant in the transmission of the message.

And I am very firmly of the opinion under the evidence that this negligence amounted to gross negligence. Such a delay, unexplained, as here occurred in the transmission of an important message under an arrangement such as the evidence showed,—I won't say without conflict, for there was a conflict, although it preponderated in favor of the plaintiffs,—but such a delay as here occurred in the delivery of a message which showed upon its face that it was important, and the failure to trace it out of the hands of the defendant within the time that was

taken here, amounts, I think, to gross negligence.

So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, and submit to him the question as to what means shall be adopted to insure the prompt and efficient transmission of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere formal insufficiency of that arrangement, which was suggested by their own agent. I think that the Court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that [130] message, if that was deemed by its agent the best method of insuring its prompt delivery. In other words, I think that it was in effect a contract of insurance for the immediate delivery of this message. It is true, the agent testified that what was said to him about the importance of the message “went in one ear and out the



other; he did not pay any attention to it." Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and therefore I am unable to sustain that defense.

Judgment will accordingly have to go for the plaintiffs as prayed.

Thereafter on the 15th day of November, 1916, said Court at the request of the defendant made and entered findings of fact and conclusions of law, and on the said 15th day of November, 1916, judgment was entered in said cause against said defendant and in favor of said plaintiffs in the sum of \$11,250, together with costs in the sum of \$39.80.

Now and in furtherance of justice and that right may be done, the defendant presents the foregoing, its bill of exceptions in said cause, and prays that the same may be settled and allowed and signed and certified by the Judge of said court, as required by law. [131]

#### **Stipulation Waiving Jury.**

(Title of Court and Cause.)

#### **STIPULATION.**

It is stipulated by and between the parties to the above-entitled action that the trial thereof may be had without a jury, the right to a jury being hereby expressly waived.



*vs. William Lange, Jr., et al.*

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Dated this 7th day of August, A. D. 1914.

SAMUEL POORMAN, Jr.,

Attorney for Plaintiffs.

BEVERLY L. HODGHEAD,

Attorney for Defendant.

[Endorsed]: Filed Aug. 10, 1914. Walter B. Maling, Clerk. By ———, Deputy Clerk.

It is hereby stipulated by the parties hereto that the foregoing bill of exceptions proposed by defendant in said cause has been prepared, certified and presented within the time allowed by law and the rules and practice and orders of this Court, and may be settled, allowed and certified by the Judge of said Court as a correct bill of exceptions in said cause upon writ of error or other proceeding and filed herein.

Dated this 24th day of April, 1917.

SAMUEL POORMAN, Jr.,

Attorney for Plaintiffs.

BEVERLY L. HODGHEAD,

Attorney for Defendant. [132]

**Order Approving, Settling and Allowing Bill of Exceptions.**

The above and foregoing was duly presented to me, the Judge of the above-entitled court, on the — day of —, 1917, within the time allowed by law, and the rules and practice and orders of this Court, and the same having been examined by counsel for the respective parties and by the Court,

NOW, THEREFORE, I, the Judge of the above-entitled court, before whom said cause was tried, do

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hereby approve, sign, settle, certify and allow the same as a full, true and correct bill of exceptions herein, and do order the same and the whole thereof to be filed as and made a part of the record in this cause.

And I further certify that said bill of exceptions contains all of the exhibits introduced or offered at the trial and hearing of said cause on which the same was heard, and also a true and correct copy of the stipulation waiving a jury trial thereof.

Dated this 24th day of April, 1917.

WM. C. VAN FLEET,

Judge of the District Court of the United States.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [133]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a  
Corporation,  
Defendant.

**Petition for Writ of Error (Defendant).**

The Western Union Telegraph Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the judgment of the Court entered

herein on the 15th day of November, 1916; comes now, by Beverly L. Hodghead, its attorney, and files herewith an assignment of errors in said cause, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and that upon the filing of said writ of error in the Clerk's office of the United States District Court, for the Northern District of California, Northern Division, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

And your petitioner will ever pray.

Dated April 26th, 1917.

BEVERLY L. HODGHEAD,

Attorney for The Western Union Telegraph Company, Defendant.

[Endorsed]: Filed Apr. 28, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [134]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY, a  
Corporation,  
Defendant.

**Assignment of Errors (Defendant).**

Now comes the above-named Western Union Telegraph Company, a corporation, defendant, and plaintiff in error herein, by its attorney, Beverly L. Hodghead, and, in connection with its petition for a writ of error herein, makes the following assignment of errors which it avers were committed by the Court upon the trial of this cause and in the rendition of the judgment against defendant appearing upon the record herein and upon which it will rely in the prosecution of its said writ of error in the above-entitled cause:

I.

The Court erred in overruling and in not sustaining the defendant's demurrer to said complaint on file herein.

II.

The Court erred in overruling and in not sustaining defendant's demurrer to the first count of plaintiffs' complaint herein.

III.

The Court erred in overruling and in not sustaining defendant's demurrer to the second count of plaintiffs' complaint herein. [135]

IV.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff Lange, as follows:

"Q. Mr. Lange, did you read the stipulation on the back of the telegraph blank on which your message was accepted for transmission?" (Referring to the original telegram of April 29th.)

V.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff J. U. Hastings, as follows:

"Q. Did the agent call your attention to any of those?" (Referring to stipulation on the back of the message.)

VI.

The Court erred in overruling defendant's motion for a nonsuit interposed by defendant at the close of plaintiffs' evidence, for the reasons set forth in said written motion for nonsuit, which was and is as follows:

"We now interpose motion on behalf of defendant for nonsuit upon the ground that the plaintiffs have not proven any cause of action against the defendant and have not shown any negligence or any failure to perform and dis-

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charge its duty under the contract in sending this message."

VII.

The Court erred in finding and deciding as follows:

"That on the same day, but after the execution of said contract, plaintiffs arranged with said Lyon County Bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of such drafts in gold coin to said Pitt and said Campbell for plaintiffs pursuant to the terms of said contract between plaintiffs and said Pitt and said Campbell and on account of the payments to be made thereunder." [136]

VIII.

The Court erred in finding and deciding as follows:

"That thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would insure the immediate delivery of said message to said Bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington defendant's said regular charges being the aggregate sum of its own tolls for the transmission of such a message from Oakland to Wabuska, plus the tolls of Yerington Electric Company for the

transmission of such a message from Wabuska to Yerington. That plaintiffs thereupon accepted said proposal of said defendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said message in writing and paid the sum of one and forty-five hundredths dollars to said defendant, through its said agent, and defendant then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent, wrote upon said message and immediately below the date thereof, the words "Deliver immediately," and simultaneously therewith accepted said message for immediate transmission to said town of Yerington and for immediate delivery to said Lyon County Bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs, and insured to plaintiffs such immediate transmission and such immediate delivery thereof, as aforesaid." [137]

IX.

The Court erred in finding and deciding as follows:

"That it is not true that defendant stated to plaintiffs at any time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any definite time, to the town of Yerington. That it is not true that defendant

informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, or that beyond that point the said message would have to be transmitted over a connecting telephone line. That it is not true that defendant suggested to plaintiffs at any time that in order to hasten delivery of said message plaintiffs might write the words "Deliver immediately" upon the face of the same, to be charged for at the usual rate of tolls. That it is not true that defendant did not, at the time said message was offered to, and accepted by, it for transmission and delivery, as aforesaid, inform plaintiffs that it could not insure the transmission or delivery of any message beyond the lines of said defendant."

X.

The Court erred in finding and deciding as follows:

"That the sum of one and forty-five hundredths dollars, so paid to defendant for said message, was in excess of the defendant's regular and usual tolls for the transmission and delivery of the same as an unrepeatd message, the usual toll therefore being ninety-eight cents. That the total charge for transmitting such a message as that herein referred to, from Oakland, California, to Yerington, Nevada, over the telegraph lines of defendant and over the telephone line of Yerington Electric Company hereinafter mentioned, as a 'repeated message,' was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the Court



finds that the said sum of [138] one and forty-five hundredths dollars, by plaintiffs paid to defendant, was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank."

XI.

The Court erred in finding and deciding as follows:

"That said blank form was one furnished by defendant at its said office for the use of all persons desiring to send telegrams, and plaintiffs did not, nor did either of them, read the printed matter on said blank, and plaintiffs were not, nor was either of them, cognizant of the terms and conditions printed thereon, nor did the defendant or its agent call the attention of the plaintiffs, or either of them, to said terms or conditions, or to any of them."

XII.

The Court erred in finding and deciding as follows:

(See XII.) That defendant accepted said message for immediate transmission and immediate delivery thereof, and insured to plaintiffs the immediate transmission and immediate delivery thereof as directed.

## XIII.

The Court erred in finding and deciding as follows:

“That defendant did not promptly, upon receipt of said message on the evening of April 29th, 1907, transmit the same to the town of Wabuska, in said State of Nevada. That defendant did not promptly deliver said message to said Yerington Electric Company for further transmission over the telephone line of said last-named Company to the town of Yerington. That, [139] on the contrary, defendant wholly failed and neglected to transmit said message to said Wabuska until May 2d, 1907, and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2d, 1907. That such failure and neglect of said defendant and the delay in the receipt of said message by said Lyon County Bank, as herein found, occurred wholly on the lines of telegraph of said defendant and was caused by defendant, and did not at all occur upon the lines of telephone of said Yerington Electric Company and was not caused by said last-named Company.”

## XIV.

The Court erred in finding and deciding as follows:

(See XVI.) “That defendant with what the Court finds to be gross negligence, delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the 2d day of May, 1907.”

XV.

The Court erred in finding and deciding as follows:

“That said 625,000 shares of the capital stock of Kennedy Consolidated Gold Mining Company, hereinbefore mentioned, have been, at all times since and including the 29th day of April, 1907, practically valueless.”

XVI.

The Court erred in finding and deciding as follows:

“That by reason of defendant’s gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon County Bank, plaintiffs suffered damage and loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty dollars; and that neither the whole nor any part thereof has been paid to plaintiffs, or to either of them, or at all.” [140]

XVII.

The Court erred in giving and rendering judgment in said cause in favor of the plaintiffs and against the defendant.

XVIII.

The agreement between Pitt and Campbell and plaintiffs herein, being Plaintiffs’ Exhibit No. 1, was an absolute contract by the terms of which said plaintiffs herein were obligated to purchase 625,000 shares of the capital stock of the Kennedy Consolidated Gold Mining Company referred to therein, and the Court erred in holding and deciding that said agreement was only an option for the purchase of said

shares and in giving and entering judgment for the plaintiffs herein.

XIX.

The agreement between plaintiffs and defendant under which said telegram of April 29, 1907, in suit herein, was accepted for transmission, being Plaintiffs' Exhibit No. 3, provided that said defendant should not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages beyond the amount received for sending the same. The evidence shows that said message was an unrepeatd message, and the Court erred in giving and entering judgment in favor of the plaintiffs for a greater sum than the cost of sending said message.

XX.

Said agreement for the transmission of said message, being Plaintiffs' Exhibit No. 3, provided that this defendant was by said agreement, made the agent of the plaintiffs without liability to forward said message over the lines of any other company when necessary to reach its destination, The evidence shows that it is necessary in order to reach its destination that said message be forwarded over the lines of the Yerington Electric Company from Wabuska to Yerington, Nevada. The Court erred in holding and deciding that said defendant insured the immediate [141] transmission and delivery of such telegram and in giving judgment for the plaintiffs herein and against the defendant for any sum whatever.

WHEREFORE, said defendant Western Union Telegraph Company, a corporation, plaintiff in error,

prays that the said judgment of said District Court may be reversed and that judgment be entered for the defendant, or, failing in that, said Court be directed to grant a new trial in said cause.

Dated April 26, 1917.

BEVERLY L. HODGHEAD,

Attorney for Defendant and Plaintiff in Error, The  
Western Union Telegraph Company.

[Endorsed]: Filed Apr. 28, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [142]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Order Allowing Writ of Error and Fixing Amount  
of Bond (Defendant).**

On the 27th day of April, 1917, came the above-named defendant, Western Union Telegraph Company, a corporation, by Beverly L. Hodghead, its attorney, and filed herein and presented to this Court its petition praying for the allowance of a writ of error, and filed and presented therewith its assignment of errors intended to be used by it, praying

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also that a transcript of the record, proceedings and papers, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other or further proceedings may be had as may be proper in the premises;

ON CONSIDERATION WHEREOF, this Court has allowed the writ of error, and the parties hereto having filed their written stipulation herein waiving any bond for costs or any supersedeas bond upon such writ of error, it is further ordered that no execution issue upon the judgment entered herein pending the determination of such writ of error.

Dated this 30th day of April, 1917.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: Filed Apr. 30, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [143]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Stipulation Waiving Supersedeas and Cost Bonds.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that on any writ of error herein issued out of the United States Circuit Court of Appeals for the Ninth Circuit, it shall not be necessary to take any bond for costs or any supersedeas bond,—the giving of such bonds, and of each thereof, by defendant above named being hereby expressly waived; and it is further stipulated and agreed that the Court may make its order directing that no execution shall issue upon the judgment entered herein pending the determination upon any such writ of error.

Dated this 25th day of April, 1917.

SAMUEL POORMAN, Jr.,  
Attorney for Plaintiffs.

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Attorney for Defendant.

SO ORDERED.

WM. C. VAN FLEET,  
Judge of the District Court of the United States.

[Endorsed]: Filed Apr. 30, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [144]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

AT LAW—No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,  
Defendant.

**Acceptance of Service of Citation.**

I hereby, this — day of May, 1917, accept, on behalf of William Lange, Jr., and J. U. Hastings, defendants in error, due personal service of the citation herein issued on the writ of error brought by said The Western Union Telegraph Company, a corporation, plaintiff in error.

SAMUEL POORMAN, Jr.,  
Attorney for William Lange, Jr., and J. U. Hastings, Defendants in Error.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [145]



*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

AT LAW—No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant.

**Petition for Writ of Error (Plaintiffs).**

And now come William Lange, Jr., and J. U. Hastings, the plaintiffs herein, and say that on or about the 15th day of November, 1916, this Court entered judgment herein in favor of the plaintiffs and against the defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, these plaintiffs pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings and papers in this cause, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit.

SAMUEL POORMAN, Jr.,  
Attorney for Plaintiffs.

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[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [146]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

AT LAW—No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,  
Defendant.

**Assignment of Errors (Plaintiffs).**

The plaintiffs in this action, in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial of the cause, to wit:

1. That said Court erred in not awarding the plaintiffs their full damages, with interest and costs.

2. That said Court erred in rendering judgment in favor of plaintiffs and against defendant for the sum of eleven thousand two hundred and fifty dollars (\$11,250) only, and in failing and refusing to include in said judgment interest on said sum as prayed for in the complaint herein.

3. That said Court erred in rendering judgment against the defendant and in favor of plaintiffs for said sum of eleven thousand two hundred and fifty dollars (\$11,250) only, and in failing and refusing

to include in said judgment interest on said sum and after the date of the commencement of this action.

WHEREFORE, plaintiffs pray that the errors aforesaid be corrected and that said judgment be reversed, and that plaintiffs have the judgment against defendant to which they are in law entitled by reason of the correctness of errors above specified.

SAMUEL POORMAN, Jr.,  
Attorney for Plaintiffs. [147]

Receipt of a copy of the within is hereby admitted this — day of May, 1917.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [148]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

AT LAW—No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,  
Defendant.

**Order Allowing Writ of Error (Plaintiffs).**

On this — day of May, 1917, came the plaintiffs by their attorney, Samuel Poorman, Jr., Esq., and filed herein and presented to the Court their peti-

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tion, praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

And the plaintiffs having filed herein a stipulation between the parties hereto waiving the giving of any bond for costs on any writ of error herein issued out of said the United States Circuit Court of Appeals for the Ninth Circuit, and the court having made its order on said stipulation accordingly,

On consideration whereof the Court does allow the writ of error, and does order that no bond for costs be given by plaintiffs.

WM. C. VAN FLEET,  
Judge of the District Court of the United States.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [149]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

AT LAW—No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,  
Defendant.

**Acceptance of Service of Citation.**

I hereby, this — day of May, 1917, accept, on behalf of The Western Union Telegraph Company, a corporation, defendant in error, due personal service of the citation herein issued on the writ of error brought by said William Lange, Jr., and J. U. Hastings, plaintiffs in error.

BEVERLY L. HODGHEAD,  
Attorney for the Western Union Telegraph Com-  
pany, a Corporation, Defendant in Error.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [150]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Stipulation Waiving Bond.**

It is hereby stipulated and agreed by and between the parties hereto that on any writ of error herein issued out of the United States Circuit Court of Appeals for the Ninth Circuit, upon petition of plaintiffs herein, it shall not be necessary to take any bond for costs and the giving of such bond is hereby waived.

Dated April 28th, 1917.

BEVERLY L. HODGHEAD,  
Attorney for Defendant.

SAMUEL POORMAN, Jr.,  
Attorney for Plaintiffs.

SO ORDERED.

WM. C. VAN FLEET,  
Judge of the District Court of the United States.

[Endorsed]: Filed May 2, 1917. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [151]

*In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.*

No. 14,885.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs,

vs.

WESTERN UNION TELEGRAPH COMPANY,  
a Corporation,

Defendant.

**Clerk's Certificate to Record on Writ of Error.**

I, Walter B. Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing one hundred fifty-one (151) pages, numbered from 1 to 151, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writs of error.

I further certify that the cost of the foregoing return to writs of error is \$89.20; that of said amount \$71.30 was paid by the attorney for the defendant and \$17.90 was paid by the plaintiffs' attorney, and that the original writs of error and citations issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

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Court, this 7th day of June, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk. [152]

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**Writ of Error (Western Union Telegraph Company).**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Northern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Western Union Telegraph Company, a corporation, defendant and plaintiff in error, and William Lange, Jr., and J. U. Hastings, plaintiffs and defendants in error, a manifest error hath happened, to the great damage of the said The Western Union Telegraph Company, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said



Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 30th day of April, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by:

WM. C. VAN FLEET,  
District Judge.

**Return to Writ of Error (Western Union Telegraph Company).**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain

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schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: No. 14,885. United States District Court for the Northern District of California, Northern Division. The Western Union Telegraph Company, a Corporation, Plaintiff in Error, vs. William Lange, Jr., and J. U. Hastings, Defendants in Error. Writ of Error. Filed May 2, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [153]

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**Citation on Writ of Error (Western Union Telegraph Company).**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to William Lange, Jr., and J. U. Hastings, Plaintiffs Herein, and Samuel Poorman, Jr., Their Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Northern Division, wherein The Western Union Telegraph Company, a corporation, is plaintiff in error, and you are de-

pendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 30th day of April, A. D. 1917.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: No. 14,885. United States District Court for the Northern District of California, Northern Division. The Western Union Telegraph Company, a Corporation, Plaintiff in Error, vs. William Lange, Jr., and J. U. Hastings, Defendants in Error. Citation on Writ of Error. Filed May 2, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

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**Writ of Error (William Lange, Jr., et al.).**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between William Lange, Jr., and J. U. Hastings,

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plaintiffs, and The Western Union Telegraph Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said William Lange, Jr., and J. U. Hastings, plaintiffs in error, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 2d day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court in and for  
the Northern District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

WM. C. VAN FLEET,

Judge of the District Court of the United States.

**Return to Writ of Error (Wm. Lange, Jr., et al.).**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under *under* the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: No. 14,885. United States District Court for the Northern District of California, Second Division. William Lange, Jr., et al., Plaintiffs in Error, vs. The Western Union Telegraph Company, a Corporation, Defendant in Error. Writ of Error. Filed May 2, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[155]

**Citation on Writ of Error (William Lange, Jr.,  
et al.).**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The Western  
Union Telegraph Company, a Corporation,  
GREETING:

You are hereby cited and admonished to be and  
appear at a United States Circuit Court of Appeals  
for the Ninth Circuit, to be holden at the City of  
San Francisco, in the State of California, within  
thirty days from the date hereof, pursuant to a  
writ of error duly issued and now on file in the  
Clerk's Office of the United States District Court  
for the Northern District of California, wherein  
William Lange, Jr., and J. U. Hastings are plain-  
tiffs in error, and you are defendant in error, to  
show cause, if any there be, why the judgment ren-  
dered against the said defendant in error, as in the  
said writ of error mentioned, should not be cor-  
rected, and why speedy justice should not be done  
to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN  
FLEET, United States District Judge for the  
Northern District of California, this 2d day of May,  
A. D. 1917.

WM. C. VAN FLEET,  
United States District Judge.

[Endorsed]: No. 14,885. United States District  
Court for the Northern District of California,  
Second Division. William Lange, Jr., and J. U.

Hastings, Plaintiffs in Error, vs. The Western Union Telegraph Company, a Corporation, Defendant in Error. Citation on Writ of Error. Filed May 2, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [156]

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[Endorsed]: No. 3007. United States Circuit Court of Appeals for the Ninth Circuit. The Western Union Telegraph Company, a Corporation, Plaintiff in Error, vs. William Lange, Jr., and J. U. Hastings, Defendants in Error, and William Lange, Jr., and J. U. Hastings, Plaintiffs in Error, vs. The Western Union Telegraph Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writs of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed June 7, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant in Error.

**Order Extending Time in Which to File Record on  
Writ of Error and Docketing Causes.**

Good cause appearing therefor, IT IS HEREBY ORDERED that the above plaintiffs in error may have and they are each hereby granted to and including the 10th day of June, 1917, in which to file their respective records on writs of error and to docket said causes.

Dated this 24th day of May, 1917.

WM. H. HUNT,  
Circuit Judge.



[Endorsed]: No. 3007. In the United States Circuit Court of Appeals for the Ninth Circuit. The Western Union Telegraph Co., a Corporation, Plaintiff in Error, vs. William Lange, Jr., and J. U. Hastings, Defendants in Error, and William Lange, Jr., and J. U. Hastings, Plaintiffs in Error, vs. The Western Union Telegraph Co., a Corporation. Defendant in Error. Order Extending Time in Which to File Record on Writ of Error and Docketing Causes. Filed May 2, 1917. F. D. Monckton, Clerk. Refiled Jun. 7, 1917. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed July 3, 1917. F. D. Monckton, Clerk.



**No. 3007**

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**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit.**

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**THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,**

**Plaintiff in Error,**

**vs.**

**GEORGE M. BROWN, as Executor of the Estate  
of WILLIAM LANGE, JR., Deceased, and  
J. U. HASTINGS,**

**Defendants in Error,**

**and**

**GEORGE M. BROWN, as Executor of the Estate  
of WILLIAM LANGE, JR., Deceased, and  
J. U. HASTINGS,**

**Plaintiffs in Error,**

**vs.**

**THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,**

**Defendant in Error.**

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**Upon Writs of Error to the Southern Division of the  
United States District Court for the  
Northern District of California,  
Second Division.**

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**PROCEEDINGS HAD IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.**

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At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the twenty-second day of October, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

**Order of Submission.**

ORDERED above-entitled causes argued by Mr. Beverly L. Hodghead, counsel for the Western Union

Before GILBERT, ROSS and HUNT, Circuit Judges.

Action for damages against the telegraph company because of delay in transmission and delivery of a telegram sent by Lange and Hastings from Oakland, California, to the Lyon County Bank, Yerington, Nevada. After trial to the Court judgment for \$11,250.00 went against the telegraph company; whereupon it brought writ of error; and because the District Court refused to include interest upon said sum, Lange and Hastings also sued out writ of error. The entire record is presented in one transcript and for convenience we will refer to the parties as they stood, plaintiffs and defendants in the trial court. HUNT, Circuit Judge, after stating the case:

The facts found were substantially as follows: The telegraph company maintains offices in California and Nevada. On March 16, 1907, the plaintiffs made a contract with one Pitt and one Campbell, in which Pitt and Campbell agreed to sell and deliver to Lange and Hastings, and Lange and Hastings agreed to buy and receive from the parties of the first part 625,000 shares of the capital stock of the Kennedy Consolidated Mining Company, "upon the following terms and conditions, to wit": (1) Total price of the shares was \$75,000.00 gold coin, payable in this manner: \$7,500.00 upon the execution of the agreement; \$11,250.00 on or before May 1, 1907; and deferred installment payments at sixty day intervals. (2) It was agreed that upon payment of the first named sum, the parties of the first part would deposit in escrow in the Lyon County Bank at Yering-

ton, Nevada, certificates of stock standing in their names, endorsed in blank by the persons in whose names the certificates stood, and representing the aggregate, 625,000 shares of capital stock of the mining company, and would thereupon enter into escrow agreement with the parties of the second part and the bank, whereunder, the bank should hold the stock deposited with it to be delivered to the parties of the second part immediately upon the payment by them of the final payment provided for in the agreement. The bank was made the agent of the parties of the first part for receiving payments to be made under the agreement and giving necessary acquittances.

(3) It was agreed that in the event of default by said parties of the second part in making any of the payments provided for, the bank should be authorized under the terms of the deposit in escrow, and was authorized by the agreement, to deliver all of the shares of stock so deposited with it pursuant to the agreement to the parties of the first part, and that "all payments theretofore made by said parties of the second part shall be forfeited to said parties of the first part, and that thereupon all rights of each of the said parties hereunder shall forever cease and determine." It was found that upon the execution of this contract Lange and Hastings paid Pitt and Campbell the initial installment of \$7,500.00, and that thereupon Pitt and Campbell deposited in escrow with the bank at Yerington, certificates representing 625,000 shares of mining stock, properly endorsed, and the bank received the certificates of stock in escrow and held the same in accordance with

the contract; that on the same day after the execution of the contract, plaintiffs arranged with the bank to treat any drafts they might send the bank in partial payment under the contract as gold coin and to pay the amount of the draft in gold coin to Pitt and Campbell for plaintiffs, pursuant to the terms of the contract; that to make payment mentioned in the contract by the plaintiffs to Pitt and Campbell, which under the contract had to be made on or before May 1st, 1907, the plaintiffs, Lange and Hastings, on April 27th, 1907, sent by mail from Oakland, California, to the Lyon County Bank at Yerington, Nevada, a draft for \$11,250.00, payable to the order of the Lyon County Bank, the draft being perfectly good; that the draft was received by the bank at Yerington on April 30th, between the time the bank opened for business, 8:30 A. M. and 9 A. M. of the same day; that on April 29, 1907, before any telegram was delivered to the telegraph company for transmission, Lange and Hastings were informed and believed that the Mining Company stock was of little or no value, and upon obtaining such information they decided to make no more payments on their contract with Pitt and Campbell, and to abandon their rights in and to the stock under the contract, and to withdraw from the transaction. On the evening of April 29th, for the purpose of intercepting the draft mailed to the Lyon County Bank before it would be received or handled by the bank, and before payment would be made thereon, Lange and Hastings went to the telegraph company's office in Oakland and told the agent in charge thereof that



they wished immediately to send to the Bank at Yerington, Nevada, a message in these words:

“Oakland, April 29th, 1917.

“Lyon County Bank,  
Yerington, Nevada.

“Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS AND LANGE.”

It is found that the plaintiffs at that time said to the agent of the telegraph company that it was absolutely necessary that the message be delivered to the bank before the bank opened for business on the 30th of April, and they wished to know how plaintiffs could be absolutely assured that the message would be so delivered, telling the agent of the telegraph company that they had a contract for the purchase of shares of mining stock and that a payment was to be made before May 1st to Pitt and Campbell, mentioned in the message, through the bank, or that in default the contract to buy the stock would be forfeited. It is also found that the plaintiffs told the defendant that unless the message to be transmitted was delivered before banking hours on the 30th the draft would be paid and the money lost to the plaintiffs. The Court finds that thereupon the telegraph company, through its agent, represented to the plaintiffs that the defendant would insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay defendant \$1.45, which was in excess of the regular charges for transmitting the message from Oakland to Yerington;

that plaintiffs accepted the proposal, and to insure immediate delivery paid the money, and the telegraph company, by its agent, wrote upon the message below the date "Deliver Immediately": that the \$1.45 paid was in excess of the regular tolls for the transmission and delivery as an unrepeatd message, and that it was agreed that the defendant would immediately transmit and immediately deliver the message; that the message was on a blank form, upon the back of which was printed a statement to the effect that to guard against mistakes or delays, the sender should order the message repeated, and for this one-half the regular rate was the charge. In addition this printed matter also stated that it was agreed between the sender of the message and the company that the company should not be liable for mistakes or delays in transmission or delivery, or for nondelivery of any unrepeatd message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for nondelivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; and that the company is made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. There was also a clause that correctness in the transmission of a message to any point on the lines of the company would be insured by contract in writing, stating the agreed amount of risk, and payments of premium at prescribed rates, and that no employee of the company

is authorized to vary the foregoing. Other clauses in this printed matter on the back of the message are not material to the present case. The Court finds that neither Hastings nor Lange read the printed matter on the blank, and did not know its terms, and that the agent of the defendant company did not call their attention to the printed matter; that the message was not repeated by the telegraph company although plaintiffs directed that the message be transmitted in such manner as the rules required in order that the telegraph company would insure transmission and immediate delivery of the message to the bank; that in April and May, 1907, telegraphic communication between Oakland and Yerington was by telegraph lines over the Western Union from Oakland, California, to Wabuska, Nevada, which was the terminus of the Western Union line for Yerington messages, and thence by telephone over the line of the Yerington Electric Company to Yerington; that the Yerington Electric Company at that time operated the only telephone or telegraph line between Wabuska and Yerington, and in order to transmit the telegram by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from Wabuska over the line of the Yerington Electric Company to Yerington; that each of the companies received all messages offered by the other company for further transmission, subject to the stipulations on the telegraph blanks so far as applicable, each company charging therefor its own separate tolls; that the Yerington Electric Company's office and the Western Union Telegraph Company's

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office were both in the Southern Pacific Railroad Company station at Wabuska, and that the telephone instrument of the Yerington Electric Company in said office was within a few feet of the telegraphic instruments of the Western Union Company; that the Southern Pacific Company employed an agent at Wabuska to attend to its railroad business, and that by agreement between the railroad company and the telegraph company, the agent was employed to handle the telegraph business of the Western Union Company at Wabuska—that is, to receive messages transmitted to that point over the lines of the Western Union Company and transmit the messages received by him; and by arrangement between the railroad company and the Yerington Electric Company, the agent of the railroad company was employed to handle the telephone business of the Yerington Electric Company at Wabuska, and to receive and transmit all messages for transmission; that the telegraph company did not promptly, on the evening of April 29th, transmit the same to Wabuska, Nevada, and did not deliver the message to the Yerington Electric Company, but failed to deliver the message to Wabuska until May 2d, and failed to deliver the message to the Yerington Electric Company until May 2d; that if the telegraph company had acted with promptness, the message would have been received before the bank received the draft; but that because of the gross neglect on the part of the telegraph company, the message was not delivered to the Lyon County Bank until the 2d of May; that on the 30th of April, between 8:30 and

9 o'clock A. M., the bank received the draft, and thereafter, pursuant to its arrangement with the plaintiffs treated the draft as gold coin, paid over the amount to Pitt and Campbell under the terms of the contract, and on account of the payment under the terms of the contract, to be made before May 1st, credited plaintiffs for the amount so paid upon the contract; that the bank then forwarded the draft to the drawee for payment, and in due time the draft was paid; that the bank was wholly without knowledge of the message or desire on the part of the plaintiffs that the payment should not be made. It is further found that the plaintiffs made no further payments on the purchase price of the shares of stock, but abandoned the contract with Pitt and Hills, and forfeited and lost all moneys paid thereon; that the 625,000 shares of stock of the mining company have been practically valueless since the 29th of April, 1907, and that by reason of the gross negligence of the telegraph company in failing to transmit and deliver the telegraphic message as it agreed to do to the bank, plaintiffs lost the amount of the draft.

The contentions of the defendant with respect to the contract between Lange and Hastings and Pitt and Campbell are that it was not an absolute agreement to buy the mining stock and that the forfeiture clause at the end of the agreement was intended to provide an additional remedy for the benefit of the vendors; that the provision in the contract that "thereupon" all rights of each of the parties should cease relates not to the default of Lange and Hast-

ings but to the return of the stock which was not shown to have been returned; that the contract even if construed to be an option was a continuing offer to sell which was accepted when the plaintiffs mailed the bank draft before filing the telegram. But as we read the whole contract and gather from it the intentions of the parties, none of these points is sound. The language of the contract was that Pitt and Campbell agreed "to sell and deliver" and Lange and Hastings "to buy and take and receive" upon the terms and conditions which followed. The terms included payment in gold coin at times specified; the conditions required deposit by Pitt and Campbell in escrow with the bank certificates to be endorsed in blank, and that an escrow agreement should be made between Pitt and Campbell and Hastings and Lange and the bank, whereunder the bank would hold the shares to be delivered to Hastings and Lange immediately upon the payment by Hastings and Lange of the last payment called for under the provisions of the agreement. Furthermore, in case of default by Lange and Hastings in making any of the payments, these things were to follow: (1) the bank was authorized to deliver all the shares deposited to Pitt and Campbell; (2) all payments theretofore made, that is all payments which had been made by Hastings and Lange prior to the default, were forfeited to Pitt and Campbell; and thereupon, that is to say when default occurred immediately the authorization to deliver became effective, forfeiture accrued and all rights of Hastings and Lange and Pitt and Camp-

bell under the contract ceased and became determined.

The evident purpose of the parties was to make an agreement, optional in its character, and so plain in its terms that if Hastings and Lange should default in making any of the payments the agreement itself would at once provide a direct and complete adjustment and final determination of their business relationship under the contract. Such contracts are not unusual in mining sections, where the investor takes the chance that upon developing the property involved he may find his hopes rewarded and feel justified in making the deferred payments in order to receive the deed for the mining property in escrow; but should he find the property has not developed as he hoped for he may default and beyond losing all he has expended in development is released of further obligation in the premises, and the owner is compensated by the forfeiture of payments already made and is fully reinvested with the property itself. They are quite different from such a contract of sale of real estate as we find in *Stewart vs. Griffith*, 217 U. S. 323. The practical effect of such an arrangement is to give the right to the purchaser to determine from time to time whether he will pay further installments and so keep up the contract or forfeit what he has already paid in, give up all rights and avoid further liability. *Ramsey vs. West*, 31 Mo. App. 676; *Williamson vs. Hill* (Mass.), 27 N. E. 1008. We take the further view that when Hastings and Lange defaulted by the terms of the contract there arose a duty on the part of the bank

to turn over the stock to Pitt and Campbell, and also all payments which Hastings and Lange had theretofore made. The escrow agreement while specially referred to was in itself really separate from the contract between Hastings and Lange and Pitt and Campbell, who were the only parties to the contract, which defined when their respective rights thereunder would cease. Abandonment and forfeiture gave Pitt and Campbell right to their stock. The obligation of the bank to turn over the stock and forfeit payments was then a matter between the bank and Pitt and Campbell, the bank's duty not at all lessened, however, by the cessation of the rights of each of the parties to the main contract. The bank by its relation was holding as a trustee with authority to turn over by express agreement of both parties.

We cannot sustain defendant's point to the effect that assuming that the Pitt and Campbell contract was one of option, nevertheless the telegraph company would not be liable because the option was a continuing offer which was accepted by the mailing of the draft to the bank, the agent of Pitt and Campbell, for the purpose of receiving payments; and that such acceptance could not subsequently be withdrawn. The finding of the Court is that after the execution of the contract and on the same day, Hastings and Lange arranged with the bank to pay the amount of the draft sent to the bank by them at the bank in gold coin to Pitt and Campbell for plaintiffs pursuant to the terms of the contract, and also that the bank on the day that it received the draft did



pay in gold coin to Pitt and Campbell the amount of the draft pursuant to its arrangements with Hastings and Lange. It is clear to us that the bank was the agent of Hastings and Lange for the purpose of paying the gold upon the draft, and possession of the draft without further act looking toward payment to Pitt and Campbell in gold coin would be possession for Hastings and Lange. The bank was subject to the control of Hastings and Lange with respect to the draft until gold coin had been advanced by it under its previous understanding with Hastings and Lange, and if the bank had received the telegram in due time the changed purpose of the plaintiffs would have been made known in ample time.

We pass to the defenses based upon the stipulations upon the back of the message blank. It is pertinent to bear in mind that this action has little to do with any mistake in transmission of a telegraph message. The cause of action arises out of delay on the part of the telegraph company in transmission and delivery. Repetition of the message would have availed nothing as no complaint is made that there was any mistake in the verbiage of the message. The legal duty of the telegraph company was to send the message with reasonable promptness at the regular rates and to deliver it. In *Box vs. Postal Telegraph-Cable Company*, 165 Fed. 138, the Court of Appeals for the Fifth Circuit said that the regulation of the company with respect to repeated messages, while purporting to be made to guard against mistakes or delays, should be construed to

refer to such mistakes and delays as could be corrected or avoided by repetition and comparison; otherwise a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. "It is difficult," said the Court, "to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it impossible for the message to be repeated." As bearing upon the question we cite: *Purdum Naval Stores Co. vs. Western Union Telegraph Co.*, 153 Fed. 327; *Postal Telegraph-Cable Co. vs. Nichols*, 159 Fed. 643; *Pacific Postal Telegraph Co. vs. Fleishner et al.*, 66 Fed. 899. Cases like *Primrose vs. Western Union Telegraph Co.*, 154 U. S. 1, and *Coit vs. Western Union Telegraph Co.*, 130 Cal. 657, and others cited which involved mistakes in the language of messages sent are not authority upon the point here presented.

We do not believe that it was necessary that there should have been a written contract of insurance. A contract to insure specially the correctness in the transmission of a message must be made in writing; but there is no regulation which requires a written contract to insure the delivery of an unrepeatable message. We think a fair implication is that an oral contract may be made between the sender of a message and the telegraph company, whereby the company, for a consideration paid, may insure the prompt transmission and delivery of a message. Nor is the defendant to be relieved of liability under stipulation affecting liability because it was neces-

sary to forward the message over the lines of the Electric Company from Wabuska to Yerington. The findings show that the telegraph company never used the electric lines to forward the message to Yerington until May 2. There was therefore no delay on the telephone line. But assuming that there is doubt of this it could not help defendant as the agreement made was specially to deliver the message at Yerington. *Postal Telegraph etc. Co. v. Harris*, 122 S. W. 891.

It is said that under no circumstances should the Court have found that the telegraph company was guilty of gross negligence in the delay in transmission and delivery. Again we must hold against the defendant. The facts show that the situation of the plaintiffs was in great detail explained to the defendant's agent at the time that the telegram was delivered at Oakland for transmission, and that plaintiffs did all that they were advised to do to insure immediate delivery of the message. But notwithstanding their special efforts and the assurances of the telegraph company there was a failure to deliver until more than three days had gone by. In our opinion the circumstances proved gross negligence. *Western Union Telegraph Company vs. Cool*, 61 Fed. 624; *Union Construction Co. vs. Western Union Telegraph Company*, 163 Cal. 298; *Pierson vs. Western Union Telegraph Company*, 64 S. E. 577; *Redington vs. Pacific Postal Telegraph Co.*, 107 Cal. 317.

The claim for interest upon the amount awarded as damages rests upon the argument that the telegraph company, for an extra compensation, having

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insured the immediate transmission and delivery of the delayed message was bound to pay plaintiffs as indemnity the amount of the draft on a day certain in the event that the message was delayed, and that one of the implied terms of such an agreement was the obligation to pay interest as damages by reason of failure to indemnify without regard to whether the loss by such delay was or was not a liquidated sum. In our opinion the real question between the parties to the litigation was simply whether the defendant was originally liable for \$11,250.00, that being the amount of the draft paid against the wishes of Lange and Hastings as expressed in the delayed telegram. The message having been under special contract with the defendant the liability of the defendant was either in the sum named or for nothing. The loss which Lange and Hastings suffered was the exact amount of the draft, and since no benefit of any kind accrued to the plaintiffs there was no offset to be allowed as against that loss. By section 3287 of the Civil Code of California: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day, except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt." Under this statute plaintiffs should recover interest at least from the date of the presentation of their written claim to the defendant for damages in the sum of \$11,250.00, filed with the de-

fendant June 26, 1907. *Curtis vs. Innerarity*, 6 How. 146.

The judgment will therefore be modified so as to include therein interest on \$11,250.00, the principal of plaintiff's demand, from June 26, 1907, and as so modified it will be affirmed.

[Endorsed]: Opinion. Filed Feb. 11, 1918. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

**Judgment U. S. Circuit Court of Appeals.**

In error to the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

This cause came on to be heard on the Transcript of the Record from the Southern Division of the District Court of the United States for the Northern District of California, Second Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and hereby is modified so as to include therein interest on \$11,250.00, the principal of plaintiff's demand, from June 26, 1907, and as so modified the said judgment will be affirmed, with costs in favor of the defendants in error, William Lange, Jr., and J. U. Hastings, and against the plaintiff in error, the Western Union Telegraph Company, a Corporation.

It is further ordered and adjudged by this Court that the defendants in error, William Lange, Jr., and J. U. Hastings recover against the plaintiff in error, The Western Union Telegraph Company, a corporation, for their costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed Feb. 11, 1918.  
F. D. Monckton, Clerk. By Paul P. O'Brien,  
Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of April, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, JR., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

**Order Denying Petition for Rehearing.**

On consideration thereof, and by direction of the Honorable William B. Gilbert, Erskine M. Ross and and William H. Hunt, Circuit Judges, before whom

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the cause was heard, it is ORDERED that the Petition, filed March 11, 1918, on behalf of the plaintiff in error, The Western Union Telegraph Company, a corporation, for a rehearing of the above-entitled cause be and hereby is denied.

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At a stated term, to wit, the October Term, A. D. 1917, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the first day of April, in the year of our Lord, one thousand nine hundred and eighteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.



**Order of Substitution.**

Mr. Beverly L. Hodghead, counsel for the plaintiff in error, Western Union Telegraph Company, a corporation, having suggested the death of Mr. William Lange, Jr., one of the defendants in error in the above-entitled cause, and that Mr. George M. Brown has been duly appointed the executor of the Estate of said William Lange, Jr., and good cause therefor appearing, ORDERED George M. Brown, as executor of the Estate of William Lange, Jr., Deceased, be and hereby is substituted in the place of said William Lange, Jr.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 3007.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,

Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant in Error.

**Stipulation for Stay of Mandate.**

IT IS HEREBY STIPULATED AND AGREED by and between the above-named The Western Union Telegraph Company, a corporation, plaintiff in error, and the above-named William Lange, Jr., and J. U. Hastings, defendants in error, and by and between the above-named William Lange, Jr., and J. U. Hastings, plaintiffs in error, and the above-named The Western Union Telegraph Company, a corporation, defendant in error, that the issuance of the mandate in the above-entitled cause may be stayed for the period of sixty days from and after the date hereof.

Dated this 2d day of April, A. D. 1918.

BEVERLY L. HODGHEAD,

Attorney for Plaintiff in Error and Defendant in Error, The Western Union Telegraph Company.

SAMUEL POORMAN, Jr.,

Attorney for Defendants in Error and Plaintiffs in Error, William Lange, Jr., and J. U. Hastings

[Endorsed]: Stipulation for Stay of Mandate  
Filed April 5, 1918. F. D. Monekton, Clerk. By  
Paul P. O'Brien, Deputy Clerk.

*United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 3007.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant in Error.

**Affidavit of Beverly L. Hodghead.**

State of California,

City and County of San Francisco,—ss.

BEVERLY L. HODGHEAD, being first duly sworn, deposes and says: That affiant is the attorney for the Western Union Telegraph Company, the plaintiff in error in the above-entitled cause; that immediately after the petition of said plaintiff in error for rehearing of this cause was denied, on the 1st day of April, 1918, affiant advised his client in New York and the general counsel of said West-

ern Union Telegraph Company of such decision, and requested instructions as to whether to petition the Supreme Court of the United States for a review of the decision of this Honorable Court, and after considering the matter and the legal questions involved, this affiant is instructed to file a petition and seek a reversal in the Supreme Court of the United States of the said decision and judgment of this Court aforesaid. That it will be impossible to prepare a petition for a writ of certiorari and procure the record required by the rules of the Supreme Court of the United States in regard thereto, and file said petition before the mandate of this Court would issue in this cause, as provided by the rules herein. That in order to protect the rights of the plaintiff in error upon the decision of the Supreme Court of the United States upon said petition, and in said cause, the mandate from this court should be stayed until said petition can be passed upon by the Supreme Court, and if granted, then until said cause has been finally determined by said court.

That affiant has conferred with counsel for defendants in error in regard to this petition, and presents to said Court and files herewith the stipulation of defendants in error that the issuance of the mandate herein may be stayed for the period of sixty days from date hereof.

BEVERLY L. HODGHEAD.

Subscribed and sworn to before me this 5th day of April, 1918.

[Seal]

CHARLES E. REITH,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Affidavit of Beverly L. Hodghead in Support of Stipulation for Stay of Mandate. Filed April 5, 1918. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Defendants in Error,

and

WILLIAM LANGE, Jr., and J. U. HASTINGS,  
Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

**Order Staying Time for Issuance of Mandate.**

WHEREAS, judgment in the above-entitled cause was affirmed by this Court, on the 11th day of February, 1918, and the petition of the Western Union Telegraph Company, the plaintiff in error herein, for rehearing, was, on the 1st day of April, 1918, denied; and

WHEREAS, it is now made to appear to this Court by counsel for said plaintiff in error, the Western Union Telegraph Company, that it intends to petition the Supreme Court of the United States for a writ of certiorari to review the decision of said Court; and

WHEREAS, under Rule 32 the mandate of this Court would issue on the 6th day of April, 1918, unless stayed by the order of this Court, and it appearing that it is impossible for the counsel for said plaintiff in error to prepare and serve and file said petition within said time, now upon stipulation of defendants in error in said cause, and good cause appearing therefor, and upon application of counsel for Western Union Telegraph Company, plaintiff in error,—

IT IS HEREBY ORDERED that the issuance of the mandate of this Court, under Rule 32, become and the same is hereby stayed until May 27th, 1918.

Dated April 5th, 1918.

WM. H. HUNT,  
United States Circuit Judge.

[Endorsed]: Order Staying Time for Issuance of Mandate. Filed April 5, 1918. F. D. Monckton, Clerk.

**Praeipce for Transcript of Record.**

[Telegram].

Received at Post Office Building 7th & Mission Sts.  
15 S.F. D.K. D.H.

F.I. New York, N.Y. May 3, 1918.

Mr. Monckton,

Clerk U.S. Circuit Court of Appeal, San Francisco, Calif.

Please prepare record for petition for certiorari to Supreme Court in Lange and Hastings against Western Union.

BEVERLY L. HODGHEAD,

950AM.

[Endorsed]: Praeipce for Transcript of Record  
Filed May 3, 1918. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the  
Ninth Circuit.*

No. 3007.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Plaintiff in Error,

vs.

GEORGE M. BROWN, as Executor of the Estate  
of WILLIAM LANGE, Jr., Deceased, and  
J. U. HASTINGS,

Defendants in Error,

and

GEORGE M. BROWN, as Executor of the Estate  
of WILLIAM LANGE, Jr., Deceased, and  
J. U. HASTINGS,

Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COM-  
PANY, a Corporation,

Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals  
to Record Certified Under Section 3 of Rule 37  
of the Rules of the Supreme Court of the United  
States.**

I, Frank D. Monekton, as Clerk of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, do hereby certify the foregoing two hundred  
and twenty-nine (229) pages, numbered from and



including 1 to and including 229, to be a true copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to praecipe of counsel for the plaintiff in error, The Western Union Telegraph Company, a Corporation, filed May 3, 1918, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this eighth day of May, A. D. 1918.

[Seal]

F. D. MONCKTON,

Clerk.

By Paul P. O'Brien,

Deputy Clerk.

232 United States Circuit Court of Appeals for the Ninth Circuit.  
No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

WILLIAM LANGE, JR., and J. U. HASTINGS, Defendants in Error,  
and

WILLIAM LANGE, JR., and J. U. HASTINGS, Plaintiffs in Error,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Defendant in Error.

*Order Staying Time for Issuance of Mandate.*

Whereas judgment in the above entitled cause was affirmed by this Court, on the 11th day of February, 1918, and the petition of The Western Union Telegraph Company, the plaintiff in error herein, for rehearing, was, on the 1st day of April, 1918, denied, and

Whereas it is now made to appear to this Court by counsel for said plaintiff in error, The Western Union Telegraph Company, that it intends to petition the Supreme Court of the United States for a writ of certiorari to review the decision of said Court, and

Whereas under Rule 32 the mandate of this Court would issue on the 27th day of May, 1918, unless stayed by the order of this Court, and it appearing that it is impossible for the counsel for said plaintiff in error to prepare and serve and file said petition within said time, now upon stipulation of defendants in error in said cause, and good cause appearing therefor, and upon application of counsel for Western Union Telegraph Company, plaintiff in error.

It Is Hereby Ordered that the issuance of the mandate of  
233 this Court, under Rule 32, become and the same is hereby stayed until July 1st, 1918.

Dated May 25, 1918.

(Signed)

WM. W. MORROW,  
*United States Circuit Judge.*

(Endorsed:) Order Staying Time for Issuance of Mandate.  
Filed May 25, 1918. F. D. Monckton, Clerk.

A True Copy:

Attest, June 7, 1918.

F. D. MONCKTON,

*Clerk,*

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By PAUL P. O'BRIEN,

*Deputy Clerk.*

234 [Endorsed:] No. 3007. United States Circuit Court of Appeals for the Ninth Circuit. Western Union Telegraph Co. vs. William Lange, Jr., et al. and William Lange, Jr., vs. Western Union Telegraph Co. Certified Copy of Order Staying Time for Issuance of Mandate.

235 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The Western Union Telegraph Company is plaintiff in error, and William Lange, Jr., and J. E. Hastings are defendants in error; and William Lange, Jr., and J. U. Hastings are plaintiffs in error, and The Western Union Telegraph Company is defendant in error, No. 3007 which suit was removed into the said Circuit Court of Appeals by virtue of writs of error to the District Court of the United States for the Northern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do  
236 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

237 [Endorsed:] File No. 26,628. Supreme Court of the United States, No. 542, October Term, 1918. Western Union Telegraph Company vs. George M. Brown, Executor etc., et al. Writ of Certiorari. Docketed. No. 3007. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 30, 1918. F. U. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

238 United States Circuit Court of Appeals for the Ninth Circuit  
No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

GEORGE M. BROWN, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings, Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern District of California.

*Stipulation as to Return to Writ of Certiorari.*

It is hereby Stipulated and Agreed by and between the Attorneys of Record for the respective parties in the above entitled cause, that the Transcript of Record now on file in the Supreme Court of the United States in the case of The Western Union Telegraph Company, a corporation, petitioner, vs. George M. Brown, Executor of the Last Will and Testament of William Lange, Jr., deceased, and J. U. Hastings, respondents, No. 542 October Term, 1918, of said Supreme Court, shall stand as the Return of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, to the Writ of Certiorari issued out of said Supreme Court on the 31st day of October A. D. 1918.

Dated December 2d, 1918.

BEVERLY L. HODGHEAD,  
*Attorney for Plaintiff in Error and Petitioner*

SAMUEL POORMAN, JR.,  
*Attorney for Defendants in Error and Respondents*

Endorsed: Stipulation as to Return to Writ of Certiorari. Filed Dec. 9, 1918. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

239 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

GEORGE M. BROWN, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings, Defendants in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from Supreme Court U. S.*

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari", filed in the above-entitled cause on the 9th day of December, A. D. 1918, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of December, A. D. 1918.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk.*

By PAUL P. O'BRIEN,

*Deputy Clerk.*

240 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3007.

THE WESTERN UNION TELEGRAPH COMPANY, a Corporation, Plaintiff in Error,

vs.

GEORGE M. BROWN, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings, Defendants in Error.

*Return to Writ of Certiorari.*

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certi-

orari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ and send to the said Supreme Court a certified copy of a Stipulation, entered into by and between the attorneys of record, that the Transcript of Record now on file in said cause in the said Supreme Court shall stand as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 9th day of December, 1918.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of December, A. D. 1918.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,  
*Clerk of the United States Circuit Court of  
 Appeals for the Ninth Circuit;*  
 By PAUL P. O'BRIEN,  
*Deputy Clerk.*

241 [Endorsed:] File No. 26628. Supreme Court U. S. October Term, 1918. Term No. 542. Western Union Telegraph Co., Petitioner, vs. George M. Brown, Executor, etc., et al. Writ of Certiorari and Return. Filed Dec. 19, 1918.

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# In the Supreme Court

OF THE  
UNITED STATES

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October Term, 1918.

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THE WESTERN UNION TELE-  
GRAPH COMPANY, a corporation,  
*Petitioner,*

vs.

GEORGE M. BROWN, Executor of  
the Last Will and Testament of WIL-  
LIAM LANGE, Jr., Deceased, and  
J. U. HASTINGS,

*Respondents.*

No.

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NOTICE OF MOTION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.

*To the respondents in the above entitled action and  
their attorney:*

Please take notice that on Monday, the 7th day  
of October, 1918, at the opening of the Court on that  
day, or as soon thereafter as counsel can be heard,  
petitioner, The Western Union Telegraph Company,

will, upon its verified petition and copies of the entire record in this cause, submit a motion for a writ of certiorari herein (a copy of which said motion and of the petition for said writ, and brief in support thereof, are herewith delivered to you), to the Supreme Court of the United States, in its courtroom at the Capitol, in the City of Washington, District of Columbia.

Dated: San Francisco, June 12, 1918.

RUSH TAGGART,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.

# In the Supreme Court

OF THE  
UNITED STATES

---

October Term, 1918.

---

THE WESTERN UNION TELE- GRAPH COMPANY, a corporation, <i>Petitioner,</i>	}	No.
vs.		
GEORGE M. BROWN, Executor of the Last Will and Testament of WIL- LIAM LANGE, Jr., Deceased, and J. U. HASTINGS, <i>Respondents.</i>	}	

---

MOTION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT OF APPEALS FOR  
THE NINTH CIRCUIT.

Comes now The Western Union Telegraph Com-  
pany, a corporation, by its counsel, Rush Taggart and  
Beverly L. Hodghead, appearing in that behalf, and  
moves this Honorable Court that it shall, by certiorari  
or other proper process, directed to the Honorable  
Judges of the United States Circuit Court of Appeals

for the Ninth Circuit, require said Court to certify to this Court for its review and determination certain causes in said Circuit Court of Appeals lately pending upon a joint transcript on writ of error thereto, said causes together being numbered 3007 upon the docket of said Court, and in one of which said causes your petitioner, The Western Union Telegraph Company, a corporation, was plaintiff in error, and respondents William Lange, Jr. and J. U. Hastings the defendants in error, and in the other of said causes said William Lange, Jr. and J. U. Hastings were plaintiffs in error and your petitioner The Western Union Telegraph Company was defendant in error; and to that end your petitioner now tenders herewith its petition containing a brief statement of the facts and objects of this motion, and its brief in support thereof, with a certified copy of the entire record in said causes in said Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, June 12, 1918.

RUSH TAGGART,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.

# In the Supreme Court

OF THE  
UNITED STATES

October Term, 1918.

THE WESTERN UNION TELE-  
GRAPH COMPANY, a corporation,

*Petitioner,*

vs.

GEORGE M. BROWN, Executor of  
the Last Will and Testament of WIL-  
LIAM LANGE, Jr., Deceased, and  
J. U. HASTINGS,

*Respondents.*

No.

## PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit, Requiring it to Certify to the Supreme Court of the United States for its Review and Determination the cases entitled "The Western Union Telegraph Company, a corporation, Plaintiff in Error, vs. George M. Brown, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings, Defendants in Error," and "George M. Brown, Executor of the Last Will and Testament of William Lange, Jr., Deceased, and J. U. Hastings, Plaintiffs in Error, vs. The Western Union Telegraph Company, a corporation, Defendant in Error," Lately Pending in said Circuit Court of Appeals as Joint Appeal No. 3007 Therein.

*To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, The Western Union Telegraph Company, a corporation, respectfully prays for a writ of certiorari herein to review the decision of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court of the United States for the Northern District of California in above causes, awarding the respondents herein damages in the sum of \$11,250, with interest thereon, for alleged delay in the transmission and delivery of a certain telegraphic message between the City of Oakland, State of California, and the Town of Yerington, State of Nevada.

#### QUESTIONS INVOLVED.

The cause involves the validity and legal effect of the provision or stipulation upon the telegraph blanks generally in use throughout the United States and upon which the message in question was written, relating to the liability of telegraph companies for *delays* in the transmission or delivery of *unrepeated messages*.

This petition is based upon the fact that the decision rendered by the United States Circuit Court of Appeals in this cause held petitioner to be liable for substantial damages in said action for delay in the transmission of an *unrepeated* telegraphic message, notwithstanding the provision of the written contract under which



said message was transmitted, that said telegraph company should not be liable for delays in the transmission or delivery or for non-delivery of any *unrepeated* message beyond the amount received for sending the same. That said decision denied to this petitioner the defense to said action provided by the terms of said contract relating to the liability of said petitioner in the transmission and delivery of said message, and held that said provision of said contract was not a defense to a claim for damages alleged to have arisen through the delay of said petitioner in the transmission of said message. Your petitioner is advised by counsel that the said decision of said Circuit Court of Appeals in respect hereinabove set forth is not well founded in law; that it is inconsistent with the decision of this Court in relation to the validity of stipulations limiting the liability of telegraph companies in regard to the transmission and delivery of *unrepeated* messages, and is in conflict with the decisions in similar cases in the Federal Courts of the United States in other Circuits, and with the decision of the Supreme Court of the State of California in said Ninth Circuit, with the decision of Supreme Courts of other States in causes construing the same stipulation upon telegraphic blanks under which the message in suit here was transmitted, and is in conflict with the decision of the Interstate Commerce Commission, which by amendment of June 18, 1910, to the Interstate Commerce Act, is given jurisdiction

to determine questions of fact regarding the reasonableness of the rules and regulations of telegraph companies affecting the transmission of interstate telegraph messages.

### STATEMENT OF THE CASE.

This action was instituted for the recovery of damages, with interest thereon, for alleged delay in the delivery of a telegram filed by plaintiffs with petitioner, the defendant below, at Oakland, California, and directed to the Lyon County Bank, at Yerington, Nevada. Since the decision in the Circuit Court of Appeals, the plaintiff, William Lange, Jr., has died and his executor, George M. Brown, has been duly substituted in the action. The message was filed on the evening of April 29, 1907, at 8:50 o'clock, and read as follows:

"Oakland, April 29th, 1907.

"Lyon County Bank,

"Yerington, Nevada.

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS AND LANGE."

The draft referred to had been mailed to the bank to meet a payment of \$11,250 due May 1st under a contract which Lange and Hastings had made with Pitt and Campbell for the purchase of mining stock. Plaintiffs at the time explained to defendant's agent

that this draft would reach the bank in due course of mail and be paid on the next morning, to-wit, April 30th, unless the telegram could be delivered before the opening of the bank on that day. The telegraph company had no office at Yerington but its messages were transmitted to that point by a connecting telephone line of the Yerington Electric Company from the Town of Wabuska, which was the terminus of the Western Union Company's lines. The office at Yerington was not a night office and the telegram could not be delivered until the opening for business the next morning. If its delivery, however, were delayed until the *bank* had opened for business and the draft had been received and paid, the purpose of the message would fail. The regular course for the transmission of the telegram was from Oakland, California, to Reno, Nevada, thence to Wabuska and from that point the next morning by telephone to Yerington. It was stipulated by the parties to the suit that the message, filed at Oakland at 8:50 P. M., April 29th, "was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 P. M., April 29, 1907" (Tr., p. 70.) The operator, R. H. Collins, who handled the message at Reno, whose evidence was not contradicted, testified that he forwarded the message from Reno at 9:56 P. M. on the same day (Tr., p. 120); but the Court found that the message did not reach Wabuska on that day but "that, on the contrary, defendant wholly failed and neglected to transmit said message to

Wabuska until May 2, 1907, and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2, 1907," and that the delay "occurred wholly on the lines of telegraph of said defendant" (Tr., p. 58, Finding XV). The Lyon County Bank received the draft through the registered mail "on the 30th day of April, 1907, between the hours of 8:30 o'clock A. M. and 9:00 o'clock A. M." (Tr., p. 59), and not having received the telegram, thereafter on that day paid over the money to Pitt and Campbell (Tr., p. 59, Finding XVI). Thereupon Lange and Hastings, claiming that the money represented by the draft was lost to them, brought this action for damages.

There were a number of defenses interposed and argued with which we are not concerned in this petition, namely, first, that the contract of Lange and Hastings to purchase the mining stock from Pitt and Campbell was an absolute agreement and not an option; second, that if the bank had received the telegram in time it would nevertheless have had no right to withhold payment of the draft; third, that the delay in the delivery of the message on the morning of April 30th until after 9:00 o'clock, at which hour the bank received the draft, could by no construction be held to be gross negligence. We will earnestly press these contentions before this Court if this petition is granted.

But the defense interposed by the defendant, petitioner herein, and upon which this petition for cer-

tiorari is based, is that notwithstanding the decision of this Court and the decisions of the Supreme Court of the State of California, and in other jurisdictions, the Circuit Court of Appeals in this case failed to uphold and give effect to the stipulation in the written agreement of the parties upon the message blank which defined the liability of the telegraph company and prescribed the terms and conditions under which said message was transmitted; and said Court held that said message, notwithstanding said written agreement, was transmitted under an oral contract of insurance made with petitioner's receiving clerk with whom the message was filed.

### REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE.

The principal ground upon which petitioner urges that a writ of certiorari should issue, is the conflict of decision between the Circuit Court of Appeals in this case and the Supreme Court of the United States, the Circuit Court of Appeals of other circuits, the Supreme Court of the State of California, and the Interstate Commerce Commission, relating to the liability of telegraph companies for delay in the transmission of unrepeatd telegraphic messages.

The District Court found (Tr., p. 53, Finding XI), in relation to the stipulations upon the message blank on which the message in suit was written, as follows:

"That said message last hereinbefore referred to

was written on a blank form of the defendant containing on its face the following printed matter, to-wit:

'Form 260.

**THE WESTERN UNION TELEGRAPH  
COMPANY.**

Incorporated.

23,000 Offices in America.

Cable Service to All the World.

ROBERT C. CLOWRY,

President and General Manager.

Receiver's No.                      Time Filed.                      Check.

Send the following message subject to the terms on back hereof, which are hereby agreed to:

Read the notice and agreement on back.'

(Here was written the message as above set forth.)

"That on the back of said blank form the following printed matter appeared, to-wit:

" 'ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

" 'To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison.

" 'For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount

received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

“ ‘Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing.

“ ‘No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company’s messengers, he acts for that purpose as the agent of the sender.

“ ‘Messages will be delivered free within the established free limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

“ ‘The company will not be liable for damages or statutory penalties in any case where the claim is

not presented in writing within sixty days after the message is filed with the company for transmission.

“ ‘ROBERT C. CLOWRY,  
“ ‘President and General Manager.’ ”

The Court further found, which we charge as error, that the plaintiffs did not, nor did either of them, read the printed matter on said blank and were not cognizant of the terms and conditions printed thereon. The material allegations of plaintiffs' complaint were denied, and the separate defense interposed that said message was an *unrepeated message* and was received and transmitted under the terms of the stipulation and agreement upon the message blank above set forth.

The cause was tried by the District Court in and for the Northern District of California, without a jury, and resulted in a judgment against the defendant, petitioner herein, for the sum of \$11,250, but without interest.

A writ of error was prosecuted by the petitioner herein, to the United States Circuit Court of Appeals for the Ninth Circuit, based upon the assignment of errors found at pages 168-176 of the transcript. Plaintiffs in said action, respondents herein, also in due time prosecuted a writ of error to the said Court of Appeals, complaining of the failure of the District Court to allow interest upon the amount of said claim for damage to the date of the judgment. Their assignment of errors is found at pages 182-183 of Transcript. By a stipulation of the parties, the two writs of error



were embraced in the same transcript numbered 3007 therein. Said causes were jointly heard and argued and submitted thereafter on the 11th day of February, 1918, said Circuit Court of Appeals rendered and filed an opinion (Tr., p. 203-219) modifying said judgment so as to include therein interest on said sum of \$11,250 from June 26, 1907, and as so modified, affirmed said judgment, and, among other things, held that the provision of said message contract or stipulation limiting the liability of the telegraph company to the amount received for sending said message, had no application and was not a defense to the plaintiffs' claim for damages; and further, that notwithstanding the provisions of said *written* contract for transmission thereof, the Court held said message was transmitted under an *oral* contract of insurance made with the receiving clerk of petitioner, for the insurance of plaintiffs against loss arising from the failure to make prompt delivery thereof. That thereafter and within the time prescribed by the rule, this petitioner filed a petition for rehearing in said cause in said Circuit Court of Appeals for the reason, among others, that under the decision of this Court and other decisions herein referred to, the provision of said telegraphic blank relating to the transmission of unrepeatd messages was valid and presented a defense to plaintiffs' claim for damages and that said written agreement could not be modified or affected by an oral contract of insurance, made with the receiving clerk of said petitioner. That thereafter on the 1st

day of April, 1918, said petition for rehearing was by said Circuit Court of Appeals denied.

Your petitioner is advised by counsel that said decision of said Circuit Court of Appeals in regard to the legal effect of said written stipulations under which said message was transmitted, as above set forth, is not well founded in law; that it is inconsistent with the decision of this Court in *Primrose v. Western Union Telegraph Co.*, 154 U. S., 1, and with the decisions of the United States Circuit Court of Appeals in other circuits and of other Supreme Courts hereinbefore referred to, and which opinions will be reviewed in the brief of petitioner attached hereto; that the decision is against law in that the Court, notwithstanding that said message was sent under written agreement, held that the liability of defendant, the petitioner herein, was determined by said oral contract of insurance.

There is much confusion and conflict of judicial opinion in the various courts of the United States regarding the legal effect and validity of the provision of said contract above referred to relating to the liability of telegraph companies in regard to the transmission and delivery of unrepeatd messages. Your petitioner is advised and believes that in order to secure uniformity of decision thereupon and because of the multitude of messages which are transmitted from day to day, and the number of questions concerning the validity of said provision of said message blank, and the gravity of said question and its importance to

the public as well as to your petitioner, said decision of said Circuit Court of Appeals ought to be reviewed and said questions arising upon the construction of said provisions of said message blank be finally determined by this Court by writ of certiorari to the said Circuit Court of Appeals. These questions, respectively, were raised and presented to said Circuit Court of Appeals by the assignment of errors (Tr., p. 168-182), which petitioner avers were committed by the District Court upon the trial of said cause and the rendition of the judgment.

Your petitioner has no right of appeal or writ of error to this Honorable Court because the jurisdiction of the District Court in this cause was invoked solely on the ground of the diversity of citizenship of the parties. The Circuit Court of Appeals has stayed its mandate until July 1, 1918, in order to allow time for the presentation and determination of this petition. Your petitioner presents herewith, as a part of this petition, a brief showing more fully its views upon the questions involved and its reasons for believing these questions to be of sufficient importance to justify the issuance of the writ of certiorari to said Circuit Court of Appeals.

Your petitioner also presents and files herewith as an exhibit to this petition, a duly certified copy of the entire transcript of the record of said cause, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, requiring said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record in all the proceedings in said Circuit Court of Appeals in the joint appeal therein entitled, "The Western Union Telegraph Company, a corporation, Plaintiff in Error, vs. William Lange, Jr. and J. U. Hastings, Defendants in Error, and William Lange, Jr. and J. U. Hastings, Plaintiffs in Error, vs. The Western Union Telegraph Company, a corporation, Defendant in Error," upon the records of said Court, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that this Honorable Court may thereupon proceed to correct said errors complained of, and that the judgment of said Circuit Court of Appeals may be so modified as to reverse said judgment of said District Court in said cause.

And your petitioner will ever pray.

THE WESTERN UNION TELEGRAPH  
COMPANY, a corporation,

Petitioner.

By RUSH TAGGART,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.

STATE OF CALIFORNIA,  
City and County of San Francisco—ss.

BEVERLY L. HODGHEAD, being duly sworn, says:  
That he is counsel for the petitioner named in and  
who subscribed the foregoing petition; that he has  
read the foregoing petition for writ of certiorari; that  
the allegations thereof are true, as he verily believes;  
that the points raised therein in his opinion are mer-  
itorious; that said petition is not filed for the purpose  
of delay; that this affidavit is made by him instead of  
being made by his client because the matters alleged  
in said petition relating almost wholly to the proceed-  
ings in court are better known to affiant than to his  
said client.

*Beverly L. Hodghead.*

Subscribed and sworn to before me this 12<sup>th</sup> day of  
June, 1918.

Charles P. Hall

Notary Public in and for the City and County  
of San Francisco, State of California.

SEAL

# In the Supreme Court

OF THE  
UNITED STATES

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October Term, 1918.

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THE WESTERN UNION TELE-  
GRAPH COMPANY, a corporation,

*Petitioner,*

vs.

GEORGE M. BROWN, Executor of  
the Last Will and Testament of WIL-  
LIAM LANGE, Jr., Deceased, and  
J. U. HASTINGS,

*Respondents.*

No.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## STATEMENT OF THE CASE.

William Lange, Jr. and J. U. Hastings, respondents  
herein, instituted this action in the United States Dis-

trict Court for the Northern District of California, for damages for delay in the transmission of a telegraphic message. The jurisdiction of the Federal Court was invoked solely because of the diversity of citizenship of the parties. The message read as follows:

"Oakland, April 29, 1907.

"Lyon County Bank,

"Yerington, Nevada.

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

"HASTINGS AND LANGE."

The defendant, this petitioner, denied most of the material allegations of the complaint and set up in defense the provisions and stipulation upon the message blank under which said telegram was transmitted. The case was tried chiefly upon admissions in the pleadings and an agreed statement of facts, but some testimony was offered. Lange and Hastings had made a written agreement with W. C. Pitt and W. T. Campbell, by the terms of which the former agreed to buy certain shares of mining stock and to pay therefor in installments the sum of \$75,000 to the Lyon County Bank at Yerington, Nevada, which held the escrow agreement. (See contract, pages 75-77 of Transcript.) One installment of \$11,250 became due on or before the 1st day of May, 1907. Lange and Hastings on the 27th day of April, 1907, forwarded by registered mail a bank draft to the Lyon County Bank to meet this

payment. It was expected to reach the bank, and was in fact received there, before 9:00 o'clock on the morning of April 30th. The telegram was sent to intercept the payment of the draft. It was filed at Oakland, California, at 8:50 o'clock *on the evening of April 29th*. The office at Yerington was not a night office and the message could not reach its destination before the opening for business on the morning of April 30th. The terminus of the Western Union Telegraph line was at Wabuska, Nevada, and from that point the message had to be carried by the connecting telephone line of the Yerington Electric Company to Yerington. At the time the message was filed the plaintiffs explained to defendant's receiving clerk the purpose of the message, stating that it was sent to intercept the payment of the draft and would fail of its purpose unless it was received at the bank before opening for business on the next morning. The message *was written by plaintiffs* upon one of the regular blanks of the telegraph company, as found by the Court (Tr., p. 53-55, Finding XI.) This message contract recites that the message is sent

"Subject to the terms on the back hereof, which are hereby agreed to."

This agreement classifies messages into repeated, unrepeatd and insured messages, according to the liability which is to be assumed by the telegraph company for mistakes or delays in the transmission or de-



livery, and provides for a different rate of toll for each class of message. The rate is proportioned to the liability. The contract provides in effect that the message may be sent at the risk of the sender himself, or at the risk of the company. Notwithstanding the recital of the written contract that the message was sent "subject to the terms on the back hereof, which are hereby agreed to," the plaintiffs contended and the Court found that the message was sent under an *oral contract* made with the receiving clerk which "*insured* to plaintiffs the immediate transmission and immediate delivery of the same as directed." (Tr., p. 56, Finding XII.)

Defendant, this petitioner, contended that the message was sent under the terms of the written contract; that the provisions of this contract are valid in law. The Court found against defendant and overruled this defense. The plaintiffs claimed and the Court found that they paid an additional sum of 45 cents over the regular charge for unrepeated messages, but plaintiffs did not claim that the message was sent as a repeated message but as an *insured* message under the alleged oral contract of insurance made with the receiving clerk.

The conflict of judicial opinion upon the validity of the contract printed upon the telegraphic blank above referred to, and the importance of having a uniform and established rule upon a matter which affects not only the carrier but the multitude of per-

sons using the telegraph from day to day, is the basis of this petition to this Court.

The question is presented in this way: The regular course of the transmission of this message was by telegraph from Oakland, California, to Reno, Nevada, thence by telegraph to Wabuska, Nevada, and thence by the connecting telephone line of the Yerington Electric Company to Yerington. But as the latter office was not a night office, the message could not in any case be telephoned until the morning of April 30th. The message started on its course in due time. It is stipulated by the parties to the suit that the message which was filed at Oakland at 8:50 P. M., April 29th, "was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 P. M., April 29, 1907" (Tr., p. 70.) The operator, R. H. Collins, who handled the message at Reno and whose evidence was not contradicted, testified that he forwarded the message from Reno at 9:56 P. M. on the same day (Tr., p. 120), but the Court found that the message did not reach Wabuska on that day but it was delayed and did not reach Wabuska until May 2nd. It is undisputed, therefore, that the delay occurred *at some intermediate point* between Reno and Wabuska, or between Oakland and Wabuska. In such case, the repetition of the message or failure to repeat the same, if it had been sent as a repeated message, would have furnished notice of and been the means of avoiding

this delay. It is just such a case that the repetition of the message is intended to provide for.

There are many decisions of the State and Federal courts holding that this repeated message clause of the contract is valid in the case of *delays*. There are many other decisions holding that this clause is not valid as against delays occurring after the transmission of the message was complete but is valid as to delays at intermediate points. The decision of the Circuit Court of Appeals in this cause, holding that the above mentioned clause of the contract was not a defense to the delay in this case shown and admitted to have occurred at the intermediate point on the company's telegraph line, is directly in conflict with the recent holding of the Supreme Court of California in the case of

*Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal., 298.

The decision of the Court on this question, is found in the following statement, at page 316, where after reviewing the decisions relating to delays, the Court says:

"For this reason it (the provision of the contract in question) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee." (Italics ours.)

In the present case, the Court found that the delay occurred at an intermediate point between the sending and receiving offices, which obviously could have been avoided by repetition. The Supreme Court of California decided in the above case that the message contract had direct application to such case. The defense was denied to petitioner here by the decision of the Circuit Court of Appeals, to review which this petition is filed. The decision is also in conflict with the rule given by the Supreme Court of the United States in *Primrose v. Western Union Telegraph Co.* cited herein.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN PRIMROSE V. WESTERN UNION, 154 U. S., 1.

Attempt is frequently made to distinguish the *Primrose* case on the ground that the damage complained of arose from error in transmission and not from delay. Such is too narrow a construction of the full and elaborate opinion given by this court upon the reasonableness and validity of the stipulations here in question. The validity of the stipulation was not upheld on the ground that the repetition of the message would have corrected the error. The Court did not decide whether it would or would not have done so, but the contract was upheld upon the broader ground of the right of a carrier to make reasonable regulations for limitations of its liability. The stipulation was held

not to be an exemption from liability for negligence, but on the contrary the Court said:

"The party sending the message has the option to send it in such a manner as to hold the company responsible or to send for a less price at his own risk."

What is said in the *Primrose* case, and the whole theory of the decision, applies as well to *delays*, and especially to *delays in transmission between intermediate points*, as to errors of transmission. The Court by this decision reviews the cases from the various States upholding the provision in question and then deals specially with the reasoning of those cases declaring the provision invalid, and particularly the case of

*Tyler v. Western Union Telegraph Co.*, 60 Ill., 421.

Some of the cases it reviews are those relating to *delays in delivery*.

For convenience, we quote here the pertinent passages in the decision of the Court in the *Primrose* case, 154 U. S., 1. At page 15 the Court says:

"By the regulation now in question the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated *and to pay half as much again as the usual price in order to hold the company liable for mis-*

*takes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise."*

And again quoting from *Camp v. Western Union*:

*"There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility."*

And quoting from Chief Justice Christiancy in *Western Union v. Carew*:

*"The regulation of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for the lower rate of charge and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question."*

The Court then reviews the decisions which hold the stipulation to be invalid and replies specifically to

the case of *Tyler v. Western Union Telegraph Co.*, which is selected as containing "the fullest statement of reasons, perhaps, on that side of the question." Replying to the argument, the Court says:

*"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again, if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message."*

The Court further says:

*"The conclusion is irresistible that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence."*

The Court will observe that while there is a subsequent reference in the opinion to the stipulation against liability for errors in cipher messages, the decision as to the validity of the stipulation is not based upon the fact that the message was in cipher, but directly upon the proposition that the stipulation against liability for error or *delay* with respect to un-repeated messages, is valid as a whole, as a reason-

able and proper limitation of the carrier's liability. Such is the reasoning of the case and it is based upon authorities, some of which relate to errors in transmission and some to *delays in delivery*, but both of which line of cases are cited with approval. Besides, the Court holds that the right of telegraph companies to restrict their liability by contract is the same as of railroad companies, with which *no question of repetition is involved at all*. It is said in the *Primrose* case, pages 27-8, as follows:

"Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in *Hart v. Pennsylvania Railroad Co.*, 112 U. S., 331, 343."

It is needless to urge that the principle here under discussion was not involved in the *Primrose* case, for the Supreme Court itself decided that it was. The case is not to be distinguished on the ground that the message was in cipher, or that the error was in transmission. The controlling principle of the case is, that the telegraph company has the right

"To fix that rate for those messages which may be transmitted at the RISK OF THE SENDER, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message."



That the principle of that decision was broad enough to include *delays*, as well as errors of transmission, appears further from the decision of the United States Circuit Court of Appeals in cases cited below.

THE DECISION IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEAL FOR THE EIGHTH CIRCUIT, AND THE FIFTH CIRCUIT.

*Western Union v. Coggins*, 68 Fed., 137.  
(Eighth Circuit.)

In that case, *the damages arose solely from delay*, and the decision on this point was based solely upon the *Primrose* case. Upon authority of that decision, the judgment which had been entered in favor of plaintiff was reversed. "The plaintiffs alleged the defendant negligently failed to *deliver* the message, and by reason thereof, Farris failed to pay, etc., whereby plaintiffs were damaged."

There were other questions in the case relating to the rule of damages, but with respect to the stipulations upon the message blank concerning delays in delivery, the Court said (p. 138-9):

"This case was brought and tried before the case of *Primrose v. Telegraph Co.*, 154 U. S., 1; 14 Sup. Ct., 1098, was decided. Since the decision in that case it has been settled law in the Federal courts—First, *that the conditions contained in the stipulation quoted, subject to which the unrepeat-*

*message of the plaintiffs was sent, are reasonable and valid; second, that, under these stipulations, the telegraph company is not liable for mistakes in the transmission or delivery, or for the non-delivery, of an unrepeatd message beyond the sum received for sending the same."*

And further:

*"The decision of the Supreme Court in the case of Primrose v. Telegraph Co. silences further contention on these questions in the Federal courts."*

The adverse decision in the present case raises the contention again.

## FIFTH CIRCUIT.

The Circuit Court of Appeals in the present case cites the case of

*Box v. Postal Tel. Co.*, 165 Fed., 138, in the Fifth Circuit.

We contend that upon the record of this case, the decision in *Box v. Telegraph Co.* is directly in point for petitioner herein. The holding of the Court there was in accord with the decision of the Supreme Court of California above quoted in *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal., 316. It is said that the regulation with respect to repeated messages should be construed to refer only to such delays as could be *avoided by repetition* and comparison. In the instant case, the delay occurring at an interme-

mediate point is, as the Supreme Court of California states, the precise condition the regulation applies to. In the *Box* case the message was never transmitted at all, and no attempt was made to transmit it, although upon inquiry, plaintiff therein was erroneously informed that the message had been transmitted and delivered. The Court said, and this was the point of the whole case, that

"It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it important for the message to be repeated."

In the present case the message was started. It was delayed at an *intermediate point*. It is obvious that the delay would have been avoided by repetition. We earnestly contend that the case of *Box v. The Telegraph Co.* is directly opposed to the decision in this case when applied to the facts, as shown by the record.

THE DECISION IS IN CONFLICT WITH THE RECENT RULING OF THE INTERSTATE COMMERCE COMMISSION, WHICH IS GIVEN JURISDICTION BY THE ACT OF CONGRESS BY AMENDMENT OF JUNE 18, 1910 (Stat. L., 544, p. 309), TO DETERMINE THE REASONABLENESS OF THESE STIPULATIONS.

This Act of Congress confirms and ratifies the right of telegraph companies to make reasonable classifica-

tions of messages and charge different rates therefor. Section 1 provides as follows:

"That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, *repeated, unrepeated*, letter, commercial, press, Government, and such other classes as are just and reasonable, and *different rates may be charged for the different classes of messages.*" (36 Stat. L., 544, 545.)

*Cultra v. Western Union Telegraph Co.*

decided May 17, 1917, and reported in the advance sheets of the Interstate Commerce Commission decisions, 44 I. C. C., p. 679. While, as above stated, the message in question was sent before the amendment to the Act of Congress, yet the stipulations in question in both cases are the same, and if they are reasonable and valid limitations now under the present Act of Congress which expressly approved the classification of messages, they were reasonable and valid at the time the message in the suit was sent. We invite the Court's attention to the entire body of the opinion in this case. Portions which are pertinent to the decision here are as follows: (Italics ours.)

"Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being built upon it. The unrepeated rate or charge has always been made upon the condition, stated in the

contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeatd rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times the rate charged, with a maximum of \$50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent. of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeatd rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

"The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeatd message must

necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 25, it is said:

“The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery, or in the non-delivery of a message.’”

And again:

“As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases here. It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some State

courts would apparently meet with success, while if laid in the courts of other States would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. *But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."*

And again:

"Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and federal courts. In *Boyce v. Western*

*Union Telegraph Co.*, 89 S. E. (Va.), 106, 108, it is said:

" . . . Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeatd messages.

" . . . So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeatd and to charge different rates for each; in other words, to enter into the very contract which was made in this case."

"See also, to the same effect, *Western Union Telegraph Co. v. Dant*, 42 App. D. C., 398; *Western Union Telegraph Co. v. Bank of Spencer*, 156 Pac. (Okla.), 1175, 1179; and *Haskell Implement & S. Co. v. Postal Telegraph-Cable Co.*, 96 Atl. (Me.), 219, 223."

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS  
IN CONFLICT WITH THE WEIGHT OF AUTHORITY IN  
THE STATE COURTS.

Whenever the question has been raised, the decisions in those States which have upheld the stipulation as to errors in transmission have also upheld and applied it to delays in delivery, especially when occurring at intermediate points. These States are New York, Massachusetts, Michigan and Rhode Island.

*Massachusetts.* We will first direct the Court's attention to the decisions of the Supreme Court of



Massachusetts on this question. In *Ellis v. American Telegraph Co.*, 95 Mass., 226, it was held that the stipulation was a reasonable and valid limitation of liability and constituted a binding contract. In that case the error complained of was a mistake in transmission, but in a dictum as will afterwards appear, the Court said: "The defendant might be liable for such damages as would not be prevented by the compliance with the rules," which is the contention here. Later, in *Grinnell v. Western Union Telegraph Co.*, 113 Mass., 299, relying on the above dictum and to overcome the effect of the stipulation, the plaintiff offered to prove that the repetition of the message would not have prevented the error. The Court held the stipulation was valid but with respect to the evidence that a repetition would not cure the error, said that the above statement in the *Ellis* case was dictum, and ruled that the evidence "was rightly rejected as immaterial" (see page 306). The error in that case also, was one of transmission.

But again later, in the case of *Clement v. Western Union Telegraph Co.*, 137 Mass., 463, the same question arose as in the case now before the Court, concerning the effect of the stipulation where the only negligence complained of was delay in delivery. As that case presents the exact point at issue, we quote at some length. The Court says, page 406:

"Plaintiff contends that as the auditor found

that the defendant by its agent was guilty of gross negligence *in not delivering the message seasonably*, this stipulation does not exempt the defendant from liability for damages actually sustained.

"The only negligence shown in this case was the unexplained *delay in delivering* the message on the part of the messenger boy to whom it was, *after its receipt*, entrusted for delivery. It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or *delivering* a message, so that it would not be protected by its regulation from liability for actual damages, though in excess of the sum stipulated. *But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount unless it receive a reasonable compensation for assuming further responsibility.*

"Without discussing the question as to what is the difference, if any, between ordinary and gross negligence we are of the opinion that the only negligence proved in this case was such *negligence as the parties intended to include in their stipulation and that such stipulation as applied to such negligence is reasonable and valid.*"

The limitation of liability is not conditioned on the repetition of the message, but depends on the payment of the consideration.

The above case was cited with approval in *Pearsall v. Western Union*, 124 N. Y., 269, and in *Primrose v. Western Union*, 154 U. S., 21.

*New York.* New York is also one of the States which upholds the validity of the stipulation. In the following cases, the question arose as to whether it was valid if applied only to cases of *delay*:

*Kiley v. Western Union Telegraph Co.*, 109 N. Y., 231;

*Riley v. Western Union Telegraph Co.*, 28 N. Y. Supp., 581.

In the *Kiley* case the message was sent but not delivered. The Court said:

"That a telegraph company has the right to exact such a stipulation from its customers, is the settled law in this and most of the other States of the Union and in England (citing cases) . . . That they have the right to make reasonable regulations for the transaction of their business and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents and the mistakes and defaults incident to the transaction of their peculiar business. *The evidence brings this case within the terms of the stipulation.*"

In *Riley v. Western Union*, 28 N. Y. Supp., 581, the action was for *delay* in the transmission and delivery of a message. The Court held that in the

absence of gross negligence or wilful misconduct, the stipulation was binding between the parties.

*Michigan.* The validity of the stipulation is upheld in Michigan in *Western Union v. Carew*, 15 Mich., 525, where the error was in transmission. Later in

*Birkett v. Western Union Telegraph Co.*, 103 Mich., 361, 33 L. R. A., 404,

the Supreme Court was asked to recede from that doctrine in a case where the damage was caused by *delay*. The facts were that "At 10 o'clock plaintiff sent an unrepeatd message to the physician." "The message should have been delivered in about half an hour but was not delivered until 2 o'clock P. M. . . . *Action to recover damages for defendant's failure to promptly deliver a telegram.*"

The Court, after reviewing the authorities, says:

"It is therefore clear that in order to hold this regulation which was a part of the contract, void, we must not only overrule the decision of our own court *but must run counter to the great weight of authority.*"

In that case the same argument and the same authorities were pressed upon the attention of the Court as are now urged in this case. The Court further says:

"It is further argued by the learned counsel for

the plaintiff *that the repetition of the message would not have prevented the damage complained of and that, therefore, the failure to have it repeated does not protect the defendant from liability.*"

With respect to this argument, after referring specifically to each of the cases cited in support of the contention, the Court again says:

"It is apparent, we think, that these decisions do not sustain the text of the learned editor, and throw no light upon the present controversy."

And again, page 407, the Court says:

"The precise question was again before that court (Mass.) in *Clement v. Western Union Telegraph Co.*, *supra*, when the message had reached the receiving office and had been entrusted to a messenger boy for delivery."

And after quoting the language of the court in that case holding that "*the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation and there are no principles of public policy which should prevent the company from stipulating*" for a limitation of its liability, the Court says:

"This case is cited with approval in *Primrose v. Western U. Teleg. Co.*, *supra*."

"The question now before us is not one of neg-

lect to transmit at all, nor of failure to deliver after receipt at the place of destination. It is a case of *delay in transmission*. It is obvious that such delays may occur from various causes. *There is as much reason in stipulating against such delays as there is against inaccuracies in the message. The demand for its repetition is a notice of its importance, and the necessity for promptness additional to the language of the message itself.*

*Rhode Island. Stone v. Postal Telegraph Co.* (Rhode Island), 76 Atl., 762, was an "action by M. M. Stone & Co. against the Postal Telegraph Co. for *delay in delivery of telegrams.*" It was contended by plaintiff that the stipulation in question would not relieve the defendant of liability in cases of delay. The Court said:

"We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, *though the rule includes a limitation of the company's liability for delay in transmission. The liability of the company under this agreement is graded in accordance with the compensation received for transmitting the message. Correctness in transmission which from a consideration of the whole rule appears to include promptness in delivery, may be insured by a contract and the payment of an additional fee. All these provisions in the contract of sending, appear to be reasonable and with*

*the right of the company to impose. As is urged in the argument of the defendant's counsel, the sender is fully aware how important the prompt delivery of his message is; the message as delivered to the company ordinarily gives no indication of its importance. If the sender desires to have special care expended upon it, it is not unreasonable to ask him to pay for such particular attention. Some messages may be of trivial importance. By negligence in the transmission or delivery of one message the damages incurred may amount to no more than the cost of sending the message. In respect to another message the damages might amount to a large sum. These facts are unknown to the telegraph company, but they are within the knowledge of the sender. In these circumstances, therefore, it is fair to allow the telegraph company to enter into some agreement with the sender for liquidation or ascertaining the damages which it may be called upon to pay, and grading its charges for the service in accordance therewith. If the company is to be held to a very small liability, as for the bare amount of the tolls, it can afford to transmit the message for a very small sum; but, if it may be held liable for large damages, it must, for its own protection, charge more for the service."*

#### NO GROSS NEGLIGENCE.

The only negligence of which plaintiffs in this case could complain was the delay in the transmission of said message until after the bank opened on the morning of April 30th. This delay could not

have been much more than one hour, and would not in any sense constitute gross negligence. After the message had failed of its purpose it is immaterial whether it was delayed longer or not.

#### THE IMPORTANCE OF THE CASE.

The importance of this case which we deem of sufficient gravity to bring to the attention of this Court arises from the fact that the validity of the stipulation in question affects not only the public carrier, but almost a countless number of persons who employ the telegraph company daily as a means of rapid communication. The ground of the petition is the great diversity of opinion among courts of last resort as to the true construction of such limitations of liability. As said by the decision of the Interstate Commerce Commission in the case of *Cultra v. Western Union, contra*, these restrictions upon liability are variously referred to in different jurisdictions as

“unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. . . . On the other hand the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We will not undertake to review any of these cases here. It will suffice to say that, apart from the federal legislation now under consideration, the complainant's action, if brought in some State courts would apparently meet with success, while



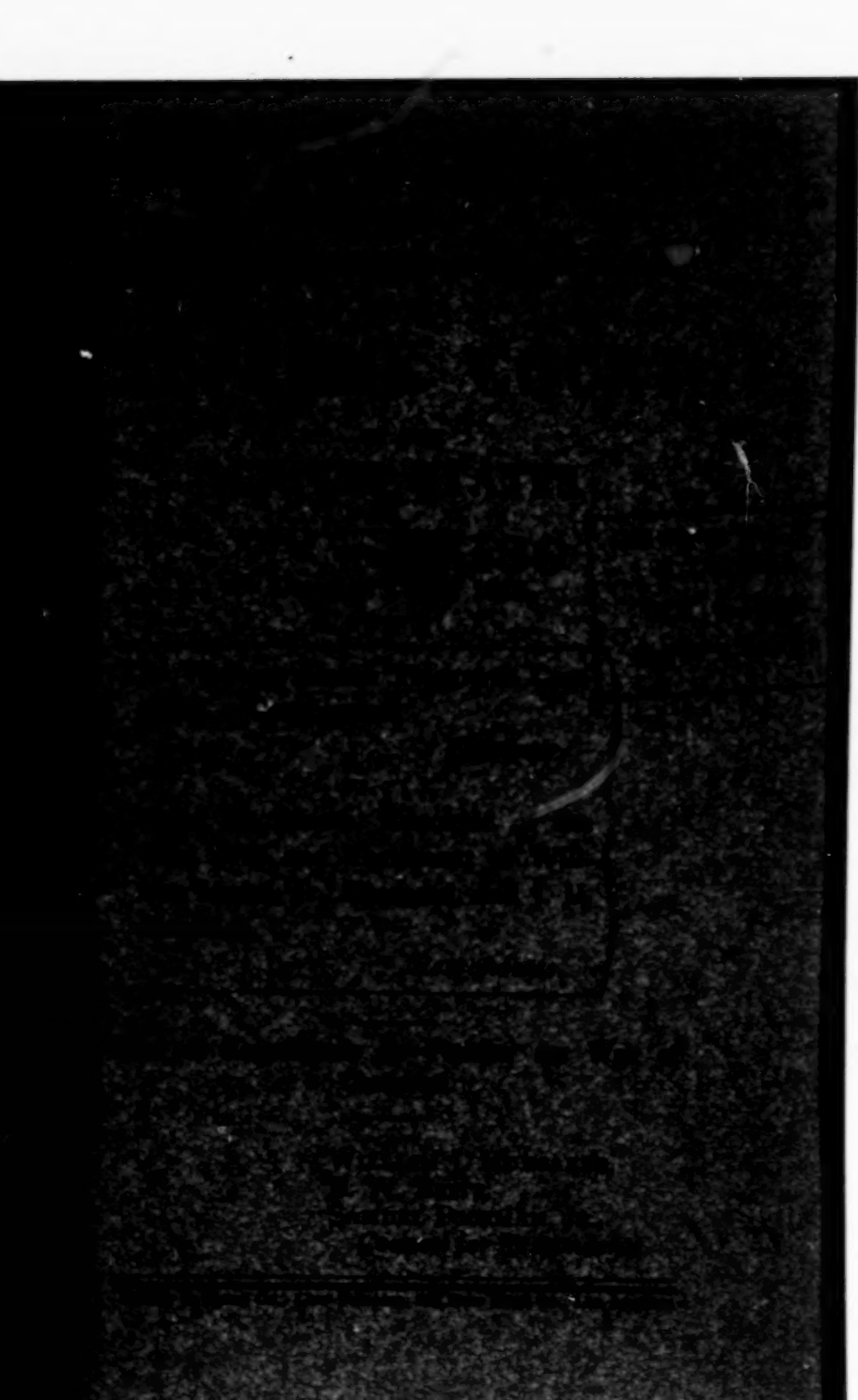
if laid in the courts of other States would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. *But whatever may occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts."*

As Congress has now authorized classification of messages made by said stipulation and such stipulation has been held valid by the Interstate Commerce Commission and other courts, but has been held invalid in an action of this character by the Circuit Court of Appeals in the present case, the uniformity of rule becomes of the utmost importance both to the carrier and those who resort to the telegraph as a means of communication. We respectfully submit that to the end that this conflict be removed and a uniform rule of law established controlling all juris-

dictions, this Court, in the exercise of its discretion, cause a writ of certiorari to issue in this cause in accordance with the prayer and petition filed herewith.

Respectfully submitted.

RUSH TAGGART,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.





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No. 542.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES.

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October Term, 1918.

The Western Union Telegraph Com-  
pany, a Corporation,

*Petitioner,*

*vs.*

George M. Brown, Executor of the  
Last Will and Testament of Will-  
iam Lange, Jr., Deceased, and J. U.  
Hastings,

*Respondents.*

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**Brief of Respondents on Petition for Writ of  
Certiorari.**

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### PRELIMINARY STATEMENT.

Plaintiffs below\* brought this action against  
defendant Telegraph Company (the petitioner  
herein) to recover \$11,250.00, with interest, as

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\*The parties are herein referred to by their respective orig-  
inal designations.

damages for a delay of three days in the transmission and delivery of a telegram sent by plaintiffs under a *special contract* whereby defendant, for an *extra toll*, INSURED its immediate transmission and delivery [Findings X, XII, Tr., pp. 52-3, 56]. After judgment by the United States District Court in favor of plaintiffs for the principal of their demand, plaintiffs and defendant, respectively, sued writs of error out of the Circuit Court of Appeals for the Ninth Circuit. The latter court directed that said judgment be modified so as to include the interest prayed for, and that as so modified it be affirmed. (*Western Union Telegraph Company v. Lange*, 248 Fed. 656, 664.) The case is now before this court on defendant's petition for a writ of *certiorari*.

### STATEMENT OF THE CASE.

For present purposes it will be necessary to state only those facts essential to a consideration of the points advanced in support of the petition herein.

On April 27th, 1907, plaintiffs, who held an option from one Pitt and one Campbell for the purchase of certain mining stock on condition of making sundry installment payments to Pitt and Campbell at Yerington, Nevada, forwarded by mail from Oakland, California, to the Lyon County Bank at Yerington, a draft,

payable to the Bank, for \$11,250.00, the amount of one of said installments. Plaintiffs had previously arranged with the Bank to advance coin on the faith of any such draft, and to pay the same to Pitt and Campbell in their behalf. In due course of mail the draft was received by the Bank on April 30th between 8:30 and 9 o'clock a. m. [Finding VII; Tr., pp. 47-8]; and thereafter on that day the Bank paid the amount thereof in gold coin to Pitt and Campbell and later reimbursed itself by collecting the draft. [Finding XVI; Tr., pp. 59-60.]

On the evening of April 29th,—the day before the draft was so received by the Bank,—plaintiffs, having discovered the mining stock to be valueless, determined not to exercise their option to purchase the same; and for the purpose of preventing such payment to Pitt and Campbell by the Bank, offered to defendant at Oakland for *immediate* telegraphic transmission and delivery to the Bank at Yerington, a message directing the Bank not to pay any sum to Pitt and Campbell but to return the draft to plaintiffs. At the time they stated to defendant's agent "that it was absolutely necessary that said message be delivered to said bank \* \* \* before banking hours on the following morning \* \* \* and desired to know of said agent in what manner the said plaintiffs could be *absolutely assured* that said message would

be so delivered." They explained the whole situation with regard to the subject matter of the message, including the purpose thereof, the time at which the draft would be received by the Bank in due course of mail, the extreme need for promptness, and the fact and the amount of the loss that they would incur if the message failed of such prompt delivery. [Finding VIII; Tr. pp. 48-50.]

It thus appears that plaintiffs placed themselves wholly in defendant's hands as regards the steps to be taken in employing the latter's instrumentalities for their special purpose. Having done so, they were advised by defendant's agent that defendant would INSURE the immediate delivery of said message if plaintiffs would pay defendant the sum of \$1.45, which was *in excess* of defendant's *ordinary tolls*. This plaintiffs accordingly did; and defendant's agent thereupon wrote upon the message the words "Deliver immediately" and simultaneously accepted said message on the terms indicated and INSURED to plaintiffs such immediate transmission and delivery [Finding VIII; Tr., pp. 48-52].

In order to transmit a message electrically from Oakland to Yerington at the time in question, it was necessary to send the message by telegraph from Oakland to Wabuska over the lines of defendant, and thence over the tele-

phone lines of Yerington Electric Company to Yerington, but defendant did not inform plaintiffs of this fact [Finding IX; Tr. p. 52]. Not only did defendant fail promptly to deliver said message to the addressee thereof, or to the connecting telephone line, on the evening of April 29th or the morning of April 30th, but it wholly failed to transmit said message to Wabuska, its own terminus, until May 2nd; and this delay occurred wholly on defendant's lines of telegraph [Finding XV; Tr. p. 58].

As above stated, the Bank at Yerington received the draft between 8:30 and 9 o'clock a. m. on April 30th and later that day paid the amount thereof in gold coin to Pitt and Campbell without any knowledge of plaintiff's desire to withhold payment. [Finding XVI; Tr., pp. 59-60]. The trial court found that defendant's delay in the transmission and delivery of said message until May 2d constituted "*gross negligence*" [Finding XVI; Tr., p. 59], by reason whereof plaintiff suffered a loss in the amount of the draft. [Finding XX; Tr. p. 61].

### **The Points Made in Support of the Petition.**

The petitioner here contends:

1. That the Circuit Court of Appeals failed to give effect to the stipulation on the message blank relieving the Company from liability for delay in the transmission of an *unrepeated* mes-

sage, and hence that the result of its decision is to declare the invalidity of that stipulation in disregard of the law as established by this Court in the case of *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1; and also

2. That inasmuch as the special contract entered into between plaintiffs and defendant, whereby the latter insured the *immediate transmission and delivery* of the message in question was *oral*, the Circuit Court of Appeals likewise failed to give effect to the stipulation requiring contracts to be *in writing* whereby the Company insures *correctness* in the transmission of messages.

### **Brief of the Argument on Behalf of Respondents Herein.**

#### **POINTS OF LAW AND FACT.**

Respondents make the following points in opposition to the granting of petitioner's application:

1. That no question regarding the invalidity of the "unrepeated message" clause of the stipulations on the message-blank was considered or determined by the Circuit Court of Appeals herein, for the reason that the message, out of which this action arises, was sent—not as an *unrepeated* message—but under a *special contract* whereby defendant, for an *extra* toll, *INSURED* its immediate transmission and delivery;

and that the manner in which the same was sent, and the amount paid by plaintiffs therefor, were dictated by *defendant* in response to plaintiffs' request that it be sent in *such* manner as, under defendant's rules, was required in order to effect *such* insurance.

2. That the conceded validity of said "unrepeated message" clause within its legitimate scope, does not render it of force to relieve the Telegraph Company from liability for what the Court found, on no ample evidence, to constitute its own "*gross* negligence."

3. Even if,—contrary to the fact as found by the Court,—the message had *not* been sent under a *special* contract of insurance for an *extra* toll, the "unrepeated message" clause could not relieve defendant from liability for the delay here complained of, since compliance with the terms of that clause has no tendency to prevent or obviate *delays* in transmission and delivery arising from *general* causes, but conduces only to the detection and correction of *errors in transmission* and, therefore, only to the avoidance of delays chargeable to errors in transmission, *e. g.*, errors made in the name or address of the addressee. The message in question was transmitted accurately.

4. The stipulation requiring a *written* contract to insure *correct* transmission of a message, not only does not by its terms require a

contract insuring *promptness* of transmission and delivery to be in writing, but, by necessary implication, permits such a contract to be entered into *orally*.

5. The stipulation for the non-liability of defendant for messages forwarded over a *connecting line*, has no application to the case at bar because the delay was found to have occurred *wholly upon defendant's lines*.

I.

No Question Regarding the Invalidity of the "Unrepeated Message" Clause of the Stipulations Was Considered or Determined by the Circuit Court of Appeals Herein for the Reason That the Message Out of Which This Action Arises Was Sent—Not as an Unrepeated Message—But Under a Special Contract Whereby Defendant, for an Extra Toll, Insured Its Immediate Transmission and Delivery; and the Manner in Which the Same Was Sent, and the Amount Paid by Plaintiffs Therefor, Were Dictated by Defendant in Response to Plaintiffs' Request That It Be Sent in Such Manner as, Under Defendant's Rules, Was Required in Order to Effect Such Insurance.

The stipulation relative to unrepeated messages is as follows:



"To guard against *mistakes or delays*,\* the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for *mistakes or delays* in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for *mistakes or delays* in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, *unless specially insured*, \* \* \* [Tr., p. 54.]

The court found that the plaintiffs did not read and were not cognizant of the stipulations on the message blank, and that defendant did not call their attention to the same. [Finding XI; Tr., p. 55.]

Plaintiffs contend,—and the Court found,—that they sent their message under a *special contract* by which defendant *insured* its immediate transmission and delivery in consideration of the payment of an *extra toll*, and that under the pertinent facts as exhibited by the findings, (of which the above statement is a synopsis), defendant is under the same liability to them as though, in sending said message, they had complied in all strictness with the

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\*Throughout this brief, the *italics* are our own.

formalities prescribed by the stipulations on the message blank. Our contention in this behalf presupposes that there was some technical deficiency in the contract made by plaintiffs with defendant for the sending of their message. As will presently appear, however, that contract violated no formal requirement of the stipulations on the message blank; and accordingly, the present division of this brief is designed merely to demonstrate that defendant would be in no position to avail itself of any lack of formality—if there were such lack—in the contract of insurance actually entered into.

With respect to the tolls charged by defendant, and by plaintiffs paid, the trial court found as follows:

“That the said sum of one and forty-five hundredths dollars so paid to defendant for said message, was *in excess of the defendant's regular and usual tolls* for the transmission and delivery of the same as an unrepeatable message, the usual toll therefor being ninety-eight cents. That the total charge for transmitting such message as that herein referred to, from Oakland, California, to Yerington, Nevada, \* \* \* as a ‘repeatable message,’ was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the court finds that the said sum of one and forty-five hundredths dollars \* \* \* was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant *immediately to transmit and immediately to deliver said message in such manner and under such classification*

pursuant to the rules and regulations of defendant, *was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery* thereof to said Lyon County Bank." [Finding X, Tr. pp. 52 and 53.]

In other words, plaintiffs *ordered* the message sent as a *repeated* message if defendant's stipulations *required its repetition* as a condition to the company's liability for default in the immediate transmission and delivery thereof; and plaintiffs paid for this service the amount demanded of them by defendant,—which amount (if regard be had to the testimony in the record that, at the date of the message, change was not made by defendant in pennies), included precisely the extra one-half of the regular rate charged by defendant for *repeated-message* service.

Obviously, the entire argument of petitioner, based upon the supposed conflict between the decision of the Circuit Court of Appeals herein and that of this court in the *Primrose v. Western Union Telegraph Company*, *supra*, falls to the ground; for we have here a message that was, in effect, *ordered repeated* and was *paid for as a repeated message*, but which the defendant negligently or wantonly *failed to repeat*. The case presented did not, and does not, require the determination of the validity of this particular stipulation,—the question being merely

whether or not, where plaintiffs have proceeded upon the theory that the company's stipulations *are* valid and have striven to *comply* therewith under defendant's tutelage, the latter may be permitted to escape the liability which it has been specially paid to assume, simply because plaintiffs did not, *in haec verba*, order "a repeated message." The all-sufficient answer to this,—the chief question presented,—is to be found in a passage from the oral opinion of the learned trial Court (Judge Van Fleet), who said in part:

"So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, *and submit to him the question as to what means shall be adopted to insure the prompt and efficient transmission* of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere *formal* insufficiency of that arrangement, *which was suggested by their own agent*. I think that the

Court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that message, *if that was deemed by its agent the best method of insuring its prompt delivery*. In other words, I think that it was in effect a *contract of insurance* for the immediate delivery of this message. It is true the agent testified that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it.' Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and therefore I am unable to sustain that defense." [Tr., pp. 163-164.]

While, ordinarily, a party dealing with a railroad or telegraph company is bound by the terms of the ticket, bill of lading, or message blank, whether he has read the same or not, nevertheless there are numerous exceptions or qualifications to this general rule. Thus in *Elliott on Contracts*, sec. 53, it is said:

"In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe, and justly so, that it contains no terms *other than those already agreed upon*, and that it is merely an acknowledgment thereof, *not intended to introduce any special terms*. \* \* \* So, ordinarily, when a shipper is given a bill of lading which embodies

terms *different* from those orally agreed upon, *he is not bound thereby.*"

The author cites numerous English and American cases which fully sustain the text, and notably, to the proposition last enunciated, the case of *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, where this Court, in answering the contention that when a carrier gives a shipper a bill of lading, no parol evidence can be received to vary its stipulations, said:

"Before this rule can be applied, the contract in writing must be shown to be the contract of the parties."

111 U. S. 591.

Whether or not the stipulation in question be one that would exempt defendant from liability if its terms had *not* been complied with, is, in view of the special circumstances here presented, a question with which we are not necessarily concerned, although (as we shall point out in subdivision "III" of this brief) even that question would have to be determined in favor of plaintiffs. If, in point of fact, plaintiffs *ordered* and *paid for* a *repeated* message, they are entitled to the indemnity accorded the senders of that class of message, without regard either to the precise form of words employed by them in engaging this telegraphic service from defendant, or to any supposed failure on their part (if there was any such failure) to see to it that

in so doing they complied strictly with the other formal requirements laid down in the stipulations.

The company's liability on an unrepeatd message is limited by the stipulations to the amount of the tolls paid therefor, and on a repeated message to fifty times that amount "*unless specially insured.*" Such a "*specially insured*" message was in terms ordered by plaintiffs; and that order comprehended repetition as well as insurance, if defendant's stipulations required the repetition of a message as a prerequisite to its assumption of an insurer's liability thereon. Hence, it may be confidently asserted that, in view of the limitation in the stipulations attempted to be placed upon defendant's liability for *repeated* messages "*unless specially insured,*" the ordering of the message "*insured*" was in effect the ordering of it "*repeated.*" But wholly apart from this, when plaintiffs put their case in defendant's hands, stating that they desired the message sent in such manner as would "*absolutely assure*" them of its immediate transmission and delivery, and then complied strictly with the directions given them by defendant's agent to the end that the message should be so sent, they are entitled to the benefit of the contract so made irrespective of its form answering precisely to all the niceties prescribed by the stipulations on the message blank.

II.

**The Conceded Validity of Said "Unrepeated Message" Clause Within Its Legitimate Scope Does Not Render It of Force to Relieve the Telegraph Company From Liability for What the Court Found, on Ample Evidence, to Constitute Its Own Gross Negligence.**

The case of *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, is the leading case in according to the stipulation respecting unrepeated messages the force of relieving the telegraph company from the results of its negligence. But the facts of that case did not exhibit an instance of *gross* negligence, and, at page 27 of said volume, this Court, in declaring that "a jury would not have been warranted in finding that it was *more than ordinary negligence*," clearly intimated that where such a finding is justified, the stipulation will not relieve the company from liability. There the default consisted of a mistake in the transmission of a cipher message where repetition and comparison is of the highest importance in order to insure *correctness*, since the receiving operator has not a sensible and intelligible context to aid him in discovering errors. The negligence there complained of would obviously *not* have constituted *gross* negligence even if the sending operator had failed to send the correct symbol; and it is



common knowledge that the electric current may be so temporarily interrupted, by a variety of natural causes beyond human control, as to result in a long dash being transmitted as a dot and a dash,—the very error in that case complained of.

In the case at bar, however, we have a flagrant instance of gross negligence. *Three days' delay* in the transmission and delivery of any telegram,—particularly when its importance was *apparent* on its face and was *fully explained to the company*,—is negligence of so gross and inexcusable a kind as to remove the case from within the sphere in which such stipulations are accorded any force of exemption. The ordinary prudent and reasonable man,—whose supposititious conduct, under circumstances such as those presented in the case under consideration, is always the criterion of the degree of care or negligence displayed,—would infallibly have exercised greater diligence in a matter of such importance. A delay of three days, when the company was *fully advised* of the circumstances that made delivery within ten or eleven hours *absolutely indispensable*, and when it thereupon undertook for an *additional* compensation to effect an *immediate* delivery and evidenced its undertaking in that regard by writing the words, “deliver immediately,” on the face of the message,—is either *gross* or *wilful* negligence,—

that is, it amounts to a *wanton disregard* of the rights of plaintiffs.

The Civil Code of California, sec. 2162, requires of a telegraph company "*great care and diligence* in the transmission and delivery of messages." In *Western Union Tel. Co. v. Cook*, 61 Fed. 624, 629, (C. C. A., Ninth Circuit), it is held that no stipulation of the telegraph company can be permitted to have the effect of relieving it of its obligation to exercise that degree of care and diligence required of it by this statute. (See also *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298.) Surely three days' delay is not the exercise of that "*great diligence*" required by the law's express provision. Only a *slight* degree of negligence—if one may differentiate between degrees of negligence,—would be an absence of such "*great care and diligence*"; or, to put it in another way, any slight or ordinary lack of care when great care is exacted by express legislative enactment, is *gross* negligence. And there can be, according to all the authorities, no exemption from liability for gross or wilful negligence, or for bad faith. See most of the cases herein cited, and also

*Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317;

*United States Tel. Co. v. Gildersleve*,  
29 Md. 232, 96 Am. Dec. 519.

In *Hendershot v. Western Union Tel. Co.*, 106 Ia. 529, 68 Am. St. Rep. 313, it was held that five hours' delay was negligence entitling plaintiff to recover. A delay of ten or twelve hours in transmission, if unexplained, has been held to create the presumption of negligence. See

*Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192;

*Western Union Tel. Co. v. Clark*, 25 S. W. 990 (Tex. Civ. App.).

When there are special circumstances, very much less delay will raise the presumption of negligence. In *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825, a telegram was sent at midnight and was delivered at 9:30 a. m. It should have been delivered at 8:30 a. m., and this unnecessary delay of one hour was held to be negligence.

In the case of *Pierson v. Western Union Tel. Co.*, 150 N. C. 559, 64 S. E. 577, a night message was filed at 8 p. m. and was delivered between 9 a. m. and 10 a. m. the next day. It could have been delivered about 8 a. m. The addressee resided about 200 yards from the telegraph office. The court said: "That this is *gross* negligence is not open to discussion."

So, "a special undertaking to deliver without regard to office hours, in consideration of extra

payment, renders the company liable for failure to perform."

*Western Union Tel. Co. v. Perry*, 30 Tex.

Civ. App. 243, 70 S. W. 439;

*Western Union Tel. Co. v. Cavin*, 30 Tex.

Civ. App. 152, 70 S. W. 229;

*Western Union Tel. Co. v. Hill*, 26 S. W.

252 (Tex. Civ. App.).

In view of the special circumstances that were fully disclosed to the company in the case at bar, and of the special undertaking on its part, in consideration of *extra* payment, to transmit and deliver immediately, there can be no doubt but that it was *grossly* negligent in not delivering the message very early on the morning of April 30th, 1907, at the latest. The fact is that the telegram could readily have been delivered that morning—the day *after* it was sent—about two hours before the bank received the draft. In this connection will be recalled the testimony of defendant's agent who accepted the message for transmission. It was to the effect, as stated in the quotation above made from the opinion of the trial court herein, "that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it.'" [Tr. pp. 163-164.] Comment would be superfluous.

III.

Even if,—Contrary to the Fact as Found by the Court,—the Message Had Not Been Sent Under a Special Contract of Insurance for an Extra Toll, the Unrepeated Message Clause Could Not Relieve Defendant From Liability for the Delay Here Complained of, Since Compliance With the Terms of That Clause Would Have No Tendency to Prevent or Obviate Delays in Transmission and Delivery Arising From General Causes, But Would Conduce Only to the Detection and Correction of Errors in Transmission and, Therefore, Only to the Avoidance of Delays Chargeable to Errors in Transmission, e. g., Errors Made in the Name or Address of the Addressee. The Message in Question Was Correctly Transmitted.

In the case of *Primrose v. Western Union Telegraph Company*, 154 U. S. 1, this court definitely established the validity of the unrepeated message clause of the telegraphic stipulations and, as stated in *Western Union Telegraph Company v. Coggin*, 68 Fed. 137, 139, (C. C. A., Eighth Circuit), that decision "silences further contention on these questions in the federal courts." The question being one

of general law in which the federal courts are not controlled by the decisions in the several states, (*Western Union Tel. Co. v. Cook*, 61 Fed. 624, 628), we are in no wise concerned with the divergent conclusions reached in the state courts. Freely conceding the validity of the stipulation within its proper sphere, we can perceive no conflict between the *Primrose* case and the decision rendered by the Circuit Court of Appeals herein. Even if the present were a case of an *unrepeated* message and one wherein defendant's negligence was *not* gross,—ideas that we repudiate,—still the stipulation would not relieve defendant from liability. As said by the Circuit Court of Appeals herein, “the cause of action arises out of *delay* on the part of the telegraph company in transmission and delivery,” and “*repetition* of the message *would have availed nothing*, as no complaint is made that there was any mistake in the verbiage of the message.” Upon this ground the court distinguished the *Primrose* case and adopted the declaration of the Circuit Court of Appeals for the Fifth Circuit in *Box v. Postal Telegraph-Cable Co.*, 165 Fed. 138, to the effect that “the regulation of the company with respect to repeated messages, while purporting to be made to guard against mistakes or delays, should be construed to refer to *such* mistakes and delays as *could be corrected or avoided by repetition and*

*comparison*; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule." (*Western Union Tel. Co. v. Lange*, 248 Fed. 656, 663.)

It is apparent, therefore, that the Circuit Court of Appeals expressly recognized the doctrine and authority of the *Primrose* case, but found the stipulation in question inapplicable in the present instance, for the reason that compliance with it, where no delay growing out of *error* in transmission is complained of, could have no conceivable tendency to promote that promptness in transmission and delivery whereat the stipulation is in part professedly aimed. That is to say, the court held the stipulation valid *within its legitimate scope*, but refused so to enlarge that scope as to render its operation *unreasonable* and to that extent void. We submit with confidence that the view taken by the learned Circuit Court of Appeals herein is unassailable.

The purpose of the stipulation requiring the *repetition* of messages is by its own terms declared to be, "to guard against mistakes or *delays*"; and the repetition is thereby defined as a "telegraphing back to the originating office for *comparison*." The case at bar arises *not* out of a mistake in *transmission*, but out of *delay* in transmission and delivery, whereby the

message entrusted to defendant did not reach the addressee for three days and, accordingly, failed of its purpose. Now, the only *delay* that could possibly be prevented or lessened by a *repetition and comparison* of the message, is obviously such a delay as would result from mistake in the transmission of the name or address of the addressee. Repetition itself takes as much time as the original transmission of the message, and if no mistake in the address is thereby discovered and corrected, the very act of repeating tends to delay rather than to expedition. In the case at bar, the message—address and all—was *correctly* transmitted, and therefore the delay complained of was in no way connected with a failure,—even had there been such a failure,—to have the message repeated.

A corporation discharging such a public calling as that assumed by a telegraph company, can impose upon its patrons only such regulations as are *reasonable*; and for a regulation to be reasonable in any sense, its observance must, in the nature of things, tend to effect that at which it is professedly aimed. On this very ground, the stipulation as to repetition has been upheld as a reasonable regulation relieving the company from liability for *mistakes in transmission* and for *such delays in delivery* as repetition would have an obvious and natural tendency to pre-



vent. The courts have never permitted a telegraph company to shield itself behind this stipulation from liability for *delay* in delivering a telegram, either when its negligence was *gross* or when,—apart from gross negligence,—the delay was such as was due to causes unconnected with error in transmission.

The moment the company attempts to stretch such a stipulation limiting liability, to cover a case wherein compliance with its terms would have no imaginable tendency to prevent the default with respect to which exemption is sought,—that moment and to that extent the stipulation becomes an *unreasonable* regulation, and, notwithstanding its *literal* import, the law grants the injured party relief.

A case exactly in point, wherein the views here expressed are fully sustained, is that of *Box v. Postal Telegraph Cable Co.*, 165 Fed. 138. The court there says of the stipulation respecting the repetition of messages:

“The rule is not intended to secure a timely effort to *send* the message, but to make more certain its *accurate transmission*. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. \* \* \* The message must, of course, be sent *before* it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports

to be made to guard against mistakes or delays, it should be construed to refer to *such mistakes and delays as could be corrected or avoided by repetition and comparison*; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' *Birney v. N. Y. & W. P. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible for the message to be repeated*. We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would not have been prevented by repeating the message." (Citing numerous authorities.)

165 Fed. 141.

In *Purdum Naval Stores Co. v. Western Union Tel. Co.*, 153 Fed. 327, (Cir. Ct., S. D. Georgia), it was held that the stipulation for non-liability in the case of unrepeatd messages was inapplicable where there was an utter failure to deliver the message at all.

In *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, the Circuit Court of Appeals for the Ninth Circuit distinguished the *Primrose* case from the case in hand (which was one of delay in transmission due to a connecting line's wires being

down) on the grounds, 1st, that the company was advised of the importance of the message and of the time when it would have to be delivered, and then undertook to transmit and deliver the same after satisfying itself of its ability to do so; and, 2nd, that within ten or fifteen minutes after the filing of the message the company became aware of the interruption in its transmission.

See, also:

*Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. 738, (Cir. Ct. D. Ore.), affirmed in

*Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, (C. C. A., Ninth Circuit);

*Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734;

*Bryant v. American Tel. Co.*, 1 Daly 575 (N. Y.);

*Birney v. New York etc. Telegraph Co.*, 18 Md. 341, 359, 81 Am. Dec. 607;

*Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309.

We cannot conceive what comfort there may be for defendant in the case of *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298. That case simply holds that the stipulation as to repeating does not apply to *delay in de-*

*delivering* a message already correctly transmitted; and the reasoning by which the court arrives at this conclusion is precisely in line with that by which we have endeavored to sustain our position herein. Moreover, the delay in the case at bar is not shown to have occurred at an *intermediate* office (which counsel contends would render the stipulation applicable), but on the contrary, as the message did not reach Wabuska, the delay may have occurred through its having been sent to an office which, with reference to Reno, was *beyond* Wabuska. In fact, we incline to the view<sup>that</sup> the message flew off at a tangent after it left Reno.

We turn now to the stipulation respecting the insurance of messages.

#### IV.

**The Stipulation Requiring a Written Contract to Insure Correct Transmission of a Message, Not Only Does Not by Its Terms Require a Contract Insuring Promptness of Transmission and Delivery to Be in Writing, But, by Necessary Implication, Permits Such a Contract to Be Entered Into Orally.**

It will be remembered that the stipulation relative to repeated messages provides that the "Company shall not be liable for *mistakes or delays* in the transmission or delivery, or for

non-delivery of any unrepeatd message, beyond the amount received for sending the same; nor for *mistakes or delays* in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, *unless specially insured*, \* \* \*." [Tr. p. 54.]

In the succeeding paragraph of the message-blank the subject of the *insurance* of messages is returned to, but only part of the subject, to-wit, insurance of *correctness in transmission* is there dealt with,—whereas that spoken of in the "repeated message" clause is insurance against "*mistakes or delays*" in "*transmission or delivery*," or against "*non-delivery*." This latter paragraph is as follows:

"*Correctness in the transmission* of a message to any point on the lines of this company can be *insured* by contract *in writing*, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the company is authorized to vary the foregoing." [Tr., pp. 54-55.]

Taking the terms of these stipulations together, it is apparent that defendant telegraph company divides messages into three general classes, as follows:

1st. *Unrepeated* messages;

2nd. *Repeated* messages;

3rd. Messages "*specially insured*" against "mistakes or *delays* in transmission or delivery" or against "non-delivery."

Of this last class of messages, those in which "*correctness* in transmission" is to be insured, must be "insured by contract *in writing*," and, for *such* insurance, premium must be paid at the rates specified on the blank.

The provision requiring a writing, together with that prescribing special insurance premium rates, applies only to messages *correctness* in the transmission of which is insured. The gist of the present action is *delay*,—not mistake. Therefore, there is nothing in the terms printed on the telegraph blank inconsistent with plaintiffs' right to effect, in the manner found by the trial court, an insurance of *immediate* transmission and delivery in consideration of the payment of a rate in excess of defendant's regular charge for ordinary, *i. e.*, *unrepeated* messages. [Findings VIII, X, XII; Tr. pp. 51-53, 56.] Nor is there anything inconsistent with those terms in the fact that the rate paid by plaintiffs was less than the sum that would have been necessary to meet defendant's premium charge if plaintiffs had been seeking,—what they were *not* seeking,—insurance of *correctness* in transmission.

To elaborate: It appears that defendant does insure both *correctness* of transmission and de-

livery and also *promptness* therein. To insure "*correctness* in transmission," defendant specifically requires "a contract *in writing*" and payment of a premium at the rate set forth. Therefore it follows, as a necessary implication, that to insure *prompt* transmission and delivery any form of contract is sufficient, since there is no special requirement of a writing, or other formality, for this case. And it is to be noted that as no premium rate is stipulated for this class of insurance, the last sentence of the paragraph specifying the rates for insurance of *correctness*,—to-wit, "No employee of the company is authorized to *vary* the foregoing,"—is wholly inapplicable to the case at bar.

V.

**The Stipulation for the Non-Liability of Defendant for Messages Forwarded Over a Connecting Line, Has No Application to the Case at Bar, Because the Delay Was Found to Have Occurred Wholly Upon Defendant's Lines.**

We are not quite sure whether petitioner makes any point under the stipulation following next after the "unrepeated message" clause on the telegraph blank. However, we shall briefly indicate the most obvious one of four limitations to its operative effect under the facts here presented.

The stipulation in question provides :

“And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.” [Tr. p. 54.]

Plainly, that stipulation is not here applicable for the reason that the delay was found by the trial court to have occurred *wholly upon defendant's lines of telegraph*. [Finding XV; Tr. p. 58.] The stipulation contemplates non-liability only for those defaults occurring on the connecting line,—that is, during such portion of the transmission as is beyond the originating company's immediate control. In the case at bar, there was no delivery of the message *to the connecting telephone line until three days after it was sent*. [Finding XIII, XV; Tr. pp. 56-59.] To be in a position to invoke this stipulation, defendant must have *forwarded* plaintiffs' message correctly and with due promptness,—that is to say, it must have transmitted the same immediately *to Wabuska* and there delivered it immediately *to the Yerington Electric Company* for further transmission to, and delivery at, Yerington. The findings negating



this situation render wholly inapplicable the stipulation respecting connecting lines. See

*Postal Tel. Cable Co. v. Harriss*, 56 Tex.

Civ. App. 105; 121 S. W. 358; 122

S. W. 891;

*Southwestern Tel. etc. Co. v. Taylor*, 26

Tex. Civ. App. 79, 63 S. W. 1076.

### Conclusion.

We attempt no recapitulation of the argument presented herewith, contenting ourselves with a reference to our "Brief of the Argument on Behalf of Respondents," *supra*. For the reasons herein discussed, it is submitted that petitioner has shown no ground justifying the issuance of the writ prayed for, and, accordingly, that its application should be denied.

Respectfully submitted,

WILLIAM J. HUNSAKER,

E. W. BRITT,

SAMUEL POORMAN, JR.,

*Counsel for Respondents.*

Due service of the within and receipt of a  
copy hereof, is hereby admitted this . . . . day  
of September, A. D. 1918.

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*Attorney for Petitioner*

No. 159

FILED

DEC 4 1919

JAMES D. MAHER,  
CLERK.

# In the Supreme Court

OF THE

UNITED STATES

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OCTOBER TERM 1919.

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THE WESTERN UNION TELEGRAPH COMPANY, a  
Corporation,

Petitioner,

vs.

GEORGE M. BROWN, Executor of the Last Will and  
Testament of WILLIAM LANGE, JR., Deceased, and  
J. U. HASTINGS,

Respondents.

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## Brief on Behalf of Western Union Telegraph Company, Petitioner

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RUSH TAGGART,  
FRANCIS R. STARK,  
195 Broadway, New York, N. Y.,  
BEVERLY L. HODGHEAD,  
58 Sutter St., San Francisco, Cal.,  
Counsel for Petitioner.

Filed this.....day of December, A. D. 1919.

JAMES D. MAHER, Clerk.

By.....Deputy Clerk.



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No. 159

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# In the Supreme Court

OF THE  
UNITED STATES

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OCTOBER TERM, 1919

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THE WESTERN UNION TELEGRAPH COM-  
PANY, a corporation,

*Petitioner,*

vs.

GEORGE M. BROWN, Executor of the  
Last Will and Testament of WILLIAM  
LANGE, Jr., Deceased, and J. U. HAS-  
TINGS,

*Respondents.*

---

## BRIEF ON BEHALF OF WESTERN UNION TELEGRAPH COMPANY, PETITIONER.

The cause comes to this Court on *certiorari* to the Circuit Court of Appeals for the Ninth Circuit.

The action was brought by respondents against the telegraph company for damages for delay in the transmission and delivery of a telegram. The message

related to a deferred payment due under a written contract made by respondents with Messrs. Pitt and Campbell for the purchase and sale of certain shares of stock in a mining corporation. Judgment went for the plaintiffs in said action for \$11,250, without interest. Both plaintiffs and defendant below brought writ of error to the Circuit Court of Appeals for the Ninth Circuit, the defendant complaining of the judgment, and the plaintiffs because the District Court refused to include interest upon said sum. The Circuit Court of Appeals modified the judgment so as to include interest and as so modified the judgment was affirmed (248 Fed. 656). The entire record is presented in one transcript, and to avoid confusion we beg leave to refer to the respective parties in this brief as they stood, plaintiffs and defendants, in the trial court.

#### QUESTIONS INVOLVED.

Three general questions are presented by the record, as follows:

THE FIRST, (on which the Writ of Certiorari was granted), involves the validity and legal effect of the printed terms and conditions upon the telegraph blank generally in use throughout the United States upon which the message in suit was written, and subject only to which terms and conditions messages are accepted for transmission. On this point petitioner contended in its petition for the writ of certiorari that

the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in

*Primrose v. Western Union Tel. Co.*, 154 U. S. 1

and with the decisions of the Circuit Courts of Appeal in other circuits and with the weight of judicial authority in the State Courts, and with the ruling of the Interstate Commerce Commission.

SECOND, whether, in view of the Finding of the Court and the admitted fact that the message in suit was written by plaintiffs upon one of the regular printed blanks of the telegraph company, signed by the plaintiffs, and reciting that the message is sent "subject to the terms on the back hereof which are hereby agreed to," it was competent for the Court to find that nevertheless the message was transmitted under an *oral* contract containing different terms, made with the receiving clerk of the telegraph company by which it was alleged the clerk insured the plaintiffs against *all loss and damage* arising from delay in the delivery and transmission of such message.

THIRD, whether the contract of plaintiffs with Messrs. Pitt and Campbell for the purchase of the shares of mining stock, to which the message in suit related, was an absolute agreement to buy the shares of stock in question, or whether it was only an option to buy.

## STATEMENT OF FACTS.

The case was tried chiefly upon the admissions in pleadings and an Agreed Statement of Facts; but there was some testimony offered. The case was tried before the Court without a jury, a jury having been waived (Tr., p. 164). The telegram was sent by plaintiffs below, Lange and Hastings, from Oakland, California, to Lyon County Bank, at Yerington, Nevada, for the purpose of intercepting the payment of a draft previously mailed by them to said bank for \$11,250, to apply upon a payment due under said contract made by said Lange and Hastings with W. C. Pitt and W. T. Campbell, wherein the latter agreed to sell and the *plaintiffs agreed to buy* certain shares of mining stocks, and providing for the payment at intervals to said bank which held the contract in escrow.

The essential facts of the case are these:

On March 16, 1907, plaintiffs Lange and Hastings entered into a written agreement with W. C. Pitt and W. T. Campbell, set out in the record at pages 75 to 77. By this contract the first parties, Pitt and Campbell, agreed to sell, and the second parties, Lange and Hastings, agreed "*to buy, take and receive from said parties of the first part*" certain shares of mining stock. Said contract is as follows (Tr., p. 75):

"THIS AGREEMENT, made this sixteenth day of March, A. D. 1907, by and between W. C. Pitt of the town of Lovelock, State of Nevada, and W. T. Campbell of the town of Yerington, State aforesaid, the parties of the first part, and J. U. Hastings of the town of Hayward, State of California, and William Lange, Jr., of the City of Oakland, State last named, the parties of the second part,

WITNESSETH: That said parties of the first part agree to sell and deliver to said parties of the second part, and said parties of the second part agree to buy, take and receive from said parties of the first part, six hundred and twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, a corporation organized and existing under the laws of the Territory of Arizona, upon the following terms and conditions, to wit:

FIRST: The total price or sum to be paid for the said shares of stock is seventy-five thousand dollars in gold coin of the United States of America, and the same shall be payable in the following manner, to wit: Seven thousand five hundred dollars upon the execution of this agreement; Eleven thousand two hundred and fifty dollars on or before the first day of May, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of July, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of September, A. D. 1907; Eleven thousand two hundred and fifty dollars

on or before the fifth day of November, A. D. 1907; Eleven thousand two hundred and fifty dollars on or before the fifth day of January, A. D. 1908; and Eleven thousand two hundred and fifty dollars on or before the fifth day of March, A. D. 1908. [61]

SECOND: It is hereby agreed by the said parties of the first part that immediately upon the payment of said first-named sum, they will deposit in escrow in and with the Lyon County Bank, of the town of Yerington, State of Nevada, certificates of stock standing in the names of either or both of them, endorsed in blank by the person or persons in whose names such certificates respectively stand, and representing in the aggregate said six hundred and twenty-five thousand shares of the capital stock of Kennedy Consolidated Gold Mining Company, and will thereupon enter into an escrow agreement with said parties of the second part and said Lyon County Bank, under which said agreement said Lyon County Bank shall hold said shares of stock deposited with it as aforesaid, to be delivered to said parties of the second part immediately upon the payment by said parties of the second part of the final payment herein provided for. And said Lyon County Bank is hereby constituted the agent of said parties of the first part for the purpose of receiving any and all payments to be made hereunder and for the purpose of giving all necessary acquittances for the sums payable under the terms hereof.

THIRD: And it is further agreed that in the event of default by said parties of the second part in making any of the payments herein provided for, said Lyon County Bank shall be authorized under the terms of such deposit in escrow, and it is hereby authorized, to deliver all of the shares of stock so deposited with it pursuant hereto to said parties of the first part, and that all payments theretofore made by said parties of the second part shall be forfeited to said parties of the first part, and that thereupon all rights of each of the said parties hereunder shall forever cease and determine. [62]

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year first above written.

W. C. PITT. (Seal)

W. T. CAMPBELL. (Seal)

J. U. HASTINGS. (Seal)

By SAMUEL POORMAN, Jr.,  
His Attorney in Fact.

WILLIAM LANGE, Jr.,  
By SAMUEL POORMAN, Jr.,  
His Attorney in Fact.

The stock was deposited in escrow pursuant to said agreement, and the cash payment made at the time of its execution. The next payment of \$11,250 was due on or before *May 1, 1907*. On April 27th, plaintiffs purchased a bank draft for that amount and forwarded it by registered mail, from Oakland, California, to the Lyon County Bank, at Yerington,

Nevada. In ordinary course of the mail this draft should have arrived and been delivered to the bank on the evening of *April 29th*, or on the morning of April 30th. It was in fact received by the bank between the hours of 8:30 o'clock and 9:00 o'clock A. M. on the latter date. With the draft, was a letter of instructions from plaintiffs to the bank stating that the draft was "to apply on the payment due under the escrow of Messrs. Pitt and Campbell" (Tr., p. 87). After mailing the draft the plaintiffs claimed to have received information to the effect that the stock of the mining company was of little value and, construing their contract to be an option, determined to make no further payments. Accordingly, at 8:50 o'clock on the *evening of April 29th*, they filed with the defendant Western Union Telegraph Co. at its office in Oakland, California, the message in suit, reading:

"Oakland, April 29th, 1907.

"Lyon County Bank,  
Yerington, Nevada.

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

"Hastings and Lange" (Tr., p. 83).

Plaintiffs at the time, explained to the defendant's agent the purpose of the message, stating that they had mailed a draft for \$11,250 to the Lyon County Bank on April 27th to meet a payment due on a contract for the purchase of shares of mining stock by them from Pitt and Campbell which they had



learned was of little value and desired to have the message delivered "before banking hours on the morning of April 30th," for the purpose of intercepting the payment of the draft, and that unless the message was delivered to the bank before that time, the money would be paid to Pitt and Campbell and the amount of the draft would be lost to them. *The telegraph message was written on one of the regular blanks of the telegraph company, and signed by plaintiffs, the senders* (Finding, Tr., p. 53-54). The full message containing all the written stipulation and agreements between the company and the senders in reference to its transmission and delivery, and liability assumed for error or delay is as follows (Tr., p. 83-85):

"Form No. 260.

"THE WESTERN UNION TELEGRAPH  
COMPANY,  
Incorporated.

23,000 Offices in America.

Cable Service to All the World.

ROBERT C. CLOWRY,  
President and General Manager.

Receiver's No.      Time Filed.      Check.

Send the following message subject to the terms on back hereof, which are hereby agreed to:

"Oakland, April 29th, 1907.

"Lyon County Bank,  
Yerington, Nevada,

"Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

HASTINGS AND LANGE."

"Read the notice and agreement on back."

That on the back of said blank form on which said message was the following:

**"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:**

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, beyond the amount received for sending the same; nor for mistakes or 'delays in the transmission or delivery', or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

"Correctness in the transmission of the message to any point on the lines of this Company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent., for any distance not exceeding 1,000 miles, and two per cent., for any greater distance. No employee of the Company is authorized to vary the foregoing.

"No responsibility regarding messages attaches

to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

ROBERT C. CLOWRY,  
President and General Manager."

The regular course of transmission of telegrams from Oakland, California, to Yerington, Nevada, at the time this message was filed, was over the lines of the Western Union from Oakland to Reno, Nevada, where it was relayed from Reno to Wabuska, in the State of Nevada, "which was the terminus of the Western Union Telegraph Company's lines for Yerington messages, and thence by telephone over the line of the Yerington Electric Company to Yerington" (Agreed Statement, Tr., p. 67). Each Company charged its own separate tolls. It was agreed that "in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, it was *necessary* that it be forwarded from that point over the line of the Yerington Electric Company to Yerington" (Agreed Statement, Tr., p. 68).

The regular charge for transmitting said message as an *unrepeated* message from Oakland to Yerington, including the tolls of the connecting line, was 98c. The total charge for transmitting said message as a *repeated* message was \$1.47 (Finding X, Tr., p. 53). The regular charge for transmitting the same as an *insured* message under the terms of the written contract of transmission was *one per cent. of the value of the message*, in addition to the tolls, which, upon the basis claimed for this message, was more than \$100.

Plaintiffs claim they paid defendant's agent \$1.45, under the following circumstances: that after explaining to defendant's agent the importance of the message, they inquired "of said agent in what manner the said plaintiffs could be absolutely *assured* that said message would be so delivered," (Tr., p. 49), and "that thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would *insure* the immediate delivery of said message to said bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington," (Tr., p. 51), and "that plaintiffs thereupon accepted said proposal of said defendant to transmit said message immediately and to *insure* its immediate delivery as aforesaid, and then and there plaintiffs deliv-

ered to said defendant said message in writing and paid the sum of one and forty-five hundredths dollars to said defendant" (Tr., p. 51), and said defendant then "agreed to immediately transmit and deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs and *insured to plaintiffs such immediate transmission and such immediate delivery thereof.*"

Although the oral agreement which the Court found was made with defendant's agent was for an insurance of the *immediate* delivery of the message at Yerington, it was shown that Yerington was not a night office, and by no means could a telegram be transmitted there before morning (Tr., p. 152).

The defendant's agent disputed the payment of \$1.45, and claimed the amount paid was \$1.00. He testified that if the sum of \$1.45 was received by him it was paid under a mistake. He *denied* making any oral contract *insuring* or *guaranteeing* immediate delivery of the message at Yerington (Tr., p. 34). The Court found, however, in accordance with claims of plaintiffs that defendant's agent received the sum of \$1.45, which was 47c in excess of the tolls for an unrepeatd message and that for this additional payment defendant's agent made an *oral agreement to insure the immediate transmission and delivery of said message and that the same was transmitted under such oral agreement of insurance.* (See Findings of the Court above referred to.)

The message was filed in Oakland at 8:50 P. M.,

*April 29th* (Tr., p. 139). It was stipulated (Tr., p. 70), that it was transmitted to and received at Reno, Nevada, prior to the hour of 9:30 the same evening. The Court found that the defendant did not promptly transmit the message to Wabuska nor deliver the same to the connecting line at that point until May 2d, 1907; that the delay occurred wholly on the lines of the defendant (Finding XV, Tr., p. 58), and that defendant, with what the Court found to be gross negligence, delayed the delivery of said message so long said message was not delivered to or received by said Lyon County Bank until May 2d, 1907 (Tr., p. 59).

The Bank received the registered letter containing the draft between 8:30 and 9 o'clock on April 30th, and made payment to Pitt and Campbell upon the contract. The next payment was due July 1st but the Court found that plaintiffs made no further payment on the contract, although they were privileged to do so, and forfeited and lost what had been paid (Tr., p. 60).

The Court further found upon a conflict of testimony, that the shares of stock referred to in said contract have been at all times since and including the 29th day of April, 1907, practically valueless (Tr., p. 60), and awarded judgment for plaintiffs for \$11,250, without interest.

Petitioner alleges error and contends:

*First:* That it was not competent for the Court to find that said message was transmitted under an *oral contract of insurance* which was in conflict with the *written contract of transmission*; that the agent or receiving clerk of the telegraph company had no authority to enter into any oral contract of insurance or to make any contract with relation to the transmission and delivery of such message other than the written contract or stipulations upon the message blank, *subject to which it was agreed by the parties said message was accepted for transmission.*

*Second:* Said message was transmitted under said written terms and conditions; that said conditions have been sustained by this Court as reasonable and valid, and

*Third:* Said plaintiffs, the respondents here, suffered no damage, for the reason that the contract "*to buy, take and receive said shares of stock*" from Messrs. Pitt and Campbell, was not an option from which they were at liberty at their own pleasure to withdraw, but was an absolute and enforceable agreement by the covenants of which they were bound.

## II.

## SPECIFICATION OF ERRORS.

(Tr., pages 168-176)

## Specification of Errors (Defendant).

Now comes the above-named Western Union Telegraph Company, a corporation, defendant, and plaintiff in error herein, by its attorney, Beverley L. Hodghead, and, in connection with its petition for a writ of error herein, makes the following assignment of errors which it avers were committed by the Court upon the trial of this cause and in the rendition of the judgment against defendant appearing upon the record herein and upon which it will rely in the prosecution of its said writ of error in the above-entitled cause:

## I.

The Court erred in overruling and in not sustaining the defendant's demurrer to said complaint on file herein.

## II.

The Court erred in overruling and in not sustaining defendant's demurrer to the first count of plaintiff's complaint herein.

## III.

The Court erred in overruling and in not sustaining defendant's demurrer to the second count of plaintiff's complaint herein. [135]



## IV.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff Lange, as follows:

"Q. Mr. Lange, did you read the stipulation on the back of the telegraph blank on which your message was accepted for transmission?" (Referring to the original telegram of April 29th.)

## V.

The Court erred in overruling and in not sustaining defendant's objection to the question propounded to plaintiff J. U. Hastings, as follows:

"Q. Did the agent call your attention to any of those?" (Referring to stipulation on the back of the message.)

## VI.

The Court erred in overruling defendant's motion for a nonsuit interposed by defendant at the close of plaintiffs' evidence, for the reasons set forth in said written motion for nonsuit, which was and is as follows:

"We now interpose motion on behalf of defendant for nonsuit upon the ground that the plaintiffs have not proven any cause of action against the defendant and have not shown any negligence or any failure to perform and discharge its duty under the contract in sending this message."

## VII.

The Court erred in finding and deciding as follows:

"That on the same day, but after the execution of said contract, plaintiffs arranged with said Lyon County Bank to treat any drafts they might send the bank in partial payment under the contract as gold coin, and to pay the amount of such drafts in gold coin to said Pitt and said Campbell for plaintiffs pursuant to the terms of said contract between plaintiffs and said Pitt and said Campbell and on account of the payments to be made thereunder." [136]

## VIII.

The Court erred in finding and deciding as follows:

"That thereupon said defendant, through its said agent, represented to said plaintiffs that said defendant would insure the immediate delivery of said message to said Bank at said town of Yerington, if plaintiffs would pay to said defendant the sum of one and forty-five hundredths dollars in lawful money of the United States, which said sum was in excess of said defendant's regular charges for transmitting such a message from Oakland to Yerington defendant's said regular charges being the aggregate sum of its own tolls for the transmission of such a message from Oakland to Wabuska, plus the tolls of Yerington Electric Company for the transmission of such a message from Wabuska to Yerington. That plaintiffs thereupon accepted said proposal of said defendant to transmit said message immediately and to insure its immediate delivery as aforesaid, and then and there plaintiffs delivered to said defendant said

message in writing and paid the sum of one and forty-five hundredths dollars to said defendant, through its said agent, and defendant then and there accepted and received of plaintiffs said sum last mentioned, and thereupon, and in the presence of plaintiffs, said defendant, by its said agent, wrote upon said message and immediately below the date thereof, the words "Deliver immediately," and simultaneously therewith accepted said message for immediate transmission to said town of Yerington and for immediate delivery to said Lyon County Bank, and agreed to immediately transmit and immediately deliver the same to said Lyon County Bank at said town of Yerington for said plaintiffs, and insured to plaintiffs such immediate transmission and such immediate delivery thereof, as aforesaid." [137]

## IX.

The Court erred in finding and deciding as follows:

"That it is not true that defendant stated to plaintiffs at any time that there was no way of insuring the immediate transmission or delivery of said message, or the transmission or delivery thereof within any definite time, to the town of Yerington. That it is not true that defendant informed plaintiffs that the lines of telegraph of the defendant did not extend beyond the town of Wabuska, or that beyond that point the said message would have to be transmitted over a connecting telephone line. That it is not true that defendant suggested to plaintiffs at any time that in order to hasten delivery of said message plaintiffs might write the words "Deliver immediately" upon the face of the same, to be charged for at the usual rate of tolls. That

it is not true that defendant did not, at the time said message was offered to, and accepted by, it for transmission and delivery, as aforesaid, inform plaintiffs that it could not insure the transmission or delivery of any message beyond the lines of said defendant."

### X.

The Court erred in finding and deciding as follows:

"That the sum of one and forty-five hundredths dollars, so paid to defendant for said message, was in excess of the defendant's regular and usual tolls for the transmission and delivery of the same as an unrepeatd message, the usual toll therefor being ninety-eight cents. That the total charge for transmitting such a message as that herein referred to, from Oakland, California, to Yerington, Nevada, over the telegraph lines of defendant and over the telephone line of Yerington Electric Company hereinafter mentioned, as a 'repeated message,' was, at the date of said message, the sum of one and forty-seven hundredths dollars. And the Court finds that the said sum of [138] one and forty-five hundredths dollars, by plaintiffs paid to defendant, was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in such manner and under such classification as, pursuant to the rules and regulations of defendant, was required in order that defendant would insure to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank."

## XI.

The Court erred in finding and deciding as follows:

"That said blank form was one furnished by defendant at its said office for the use of all persons desiring to send telegrams, and plaintiffs did not, nor did either of them, read the printed matter on said blank, and plaintiffs were not, nor was either of them, cognizant of the terms and conditions printed thereon, nor did the defendant or its agent call the attention of the plaintiffs, or either of them, to said terms or conditions, or to any of them."

## XII.

The Court erred in finding and deciding as follows:

(See XII.) That defendant accepted said message for immediate transmission and immediate delivery thereof, and insured to plaintiffs the immediate transmission and immediate delivery thereof as directed.

## XIII.

The Court erred in finding and deciding as follows:

"That defendant did not promptly, upon receipt of said message on the evening of April 29th, 1907, transmit the same to the town of Wabuska, in said State of Nevada. That defendant did not promptly deliver said message to said Yerington Electric Company for further transmission over the telephone line of said last-named Company to the town of Yerington. That, [139] on the contrary, defendant wholly failed and neglected to transmit said message to said Wabuska until May 2d, 1907,

and wholly failed and neglected to deliver said message to said Yerington Electric Company until May 2d, 1907. That such failure and neglect of said defendant and the delay in the receipt of said message by said Lyon County Bank, as herein found, occurred wholly on the lines of telegraph of said defendant and was caused by defendant, and did not at all occur upon the lines of telephone of said Yerington Electric Company and was not caused by said last-named Company."

#### XIV.

The Court erred in finding and deciding as follows:

(See XVI.) "That defendant with what the Court finds to be gross negligence, delayed the transmission and delivery of said message so long that said message was not delivered to or received by said Lyon County Bank until the 2d day of May, 1907."

#### XV.

The Court erred in finding and deciding as follows:

"That said 625,000 shares of the capital stock of Kennedy Consolidated Gold Mining Company, hereinbefore mentioned, have been, at all times since and including the 29th day of April, 1907, practically valueless."

#### XVI.

The Court erred in finding and deciding as follows:

"That by reason of defendant's gross negligence in failing to transmit and deliver said message immediately, as by it agreed, to said Lyon

County Bank, plaintiffs suffered damage and loss in the amount of the value of said draft, to wit, eleven thousand two hundred and fifty dollars; and that neither the whole nor any part thereof has been paid to plaintiffs, or to either of them, or at all." [140]

### XVII.

The Court erred in giving and rendering judgment in said cause in favor of the plaintiffs and against the defendant.

### XVIII.

The agreement between Pitt and Campbell and plaintiffs herein, being Plaintiffs' Exhibit No. 1, was an absolute contract by the terms of which said plaintiffs herein were obligated to purchase 625,000 shares of the capital stock of the Kennedy Consolidated Gold Mining Company referred to therein, and the Court erred in holding and deciding that said agreement was only an option for the purchase of said shares and in giving and entering judgment for the plaintiffs herein.

### XIX.

The agreement between plaintiffs and defendant under which said telegram of April 29, 1907, in suit herein, was accepted for transmission, being Plaintiffs' Exhibit No. 3, provided that said defendant should not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages beyond the amount received for sending the same.

The evidence shows that said message was an unrepeated message, and the Court erred in giving and entering judgment in favor of the plaintiffs for a greater sum than the cost of sending said message.

## XX.

Said agreement for the transmission of said message, being Plaintiffs' Exhibit No. 3, provided that this defendant was by said agreement, made the agent of the plaintiffs without liability to forward said message over the lines of any other company when necessary to reach its destination. The evidence shows that it is necessary in order to reach its destination that said message be forwarded over the lines of the Yerington Electric Company from Wabuska to Yerington, Nevada. The Court erred in holding and deciding that said defendant insured the immediate [141] transmission and delivery of such telegram and in giving judgment for the plaintiffs herein and against the defendant for any sum whatever.



## III.

## BRIEF OF THE ARGUMENT

## FIRST:

Discussing first the alleged oral contract of insurance:

THE COURT ERRED IN FINDING THAT THE MESSAGE WAS TRANSMITTED UNDER AN ORAL CONTRACT OF INSURANCE AGAINST LOSS AND DAMAGE, WHEN IT WAS AGREED BETWEEN THE PARTIES IN WRITING THAT THE MESSAGE WAS TO BE TRANSMITTED SUBJECT TO THE WRITTEN STIPULATIONS UPON THE MESSAGE BLANK.

(Specifications of Error VIII, X and XII)

(Tr., p. 170, 172-173)

The alleged *oral* contract to insure the plaintiffs against *all loss and damage for delay* in the transmission or delivery of the telegram is in direct conflict with the express terms of the *written* contract signed by the parties and subject to which it was agreed between them that the message was to be transmitted. The complaint counts on the oral contract "to transmit said message immediately *and to insure its immediate delivery*" (Tr., p. 10).

By the second count of the complaint it is alleged that defendant "received the same under agreement that it would immediately send and immediately deliver the same to said Lyon County Bank at Yerington, Nevada, *and that it would insure plaintiffs*

*against all loss or damage that they might sustain arising from any failure on the part of defendant to immediately send or immediately deliver to said Lyon County Bank said message"* (Tr., pp. 17 and 18).

The Findings and Decision of the Court are in accord with these allegations of the complaint. The loss claimed was \$11,250. The premium alleged to have been paid for this oral *contract of insurance against all loss and damage was 47c*. The Court decided that for this consideration the company's agent agreed *orally* to insure plaintiffs against all loss and damage *which might result from delay or delivery of the message*. The *written* contract, however, provides that if the message is sent as an *unrepeated* message, (for which the toll was 98c) it was to be sent at the sender's risk so far as respects damages for "*delays in transmission or delivery*" (Tr., p. 84). If it were sent as a *repeated* message, (for which the toll was \$1.47) the liability of the company for "*delays in transmission or delivery* shall not exceed fifty times the sum received for sending the same" (Tr., p. 84).

Whether the message were a repeated or an unrepeated message the liability of the company under the terms of the *written* contract could in no event exceed fifty times the amount of the toll (Tr., p. 54). By the alleged *oral* contract of insurance the company for a total compensation of \$1.45, being the same as the toll for a repeated message (pennies not

being used at that time), was to be liable for the full amount of any loss "for delays in *transmission or delivery*." The Court found that by the said oral contract the defendant "*insured to plaintiffs such immediate transmission and such immediate delivery thereof as aforesaid*."

It appears, therefore, that the terms of the *written* contract and of the alleged *oral* contract related to the same thing. Both provided a measure of damage for "*delay in the transmission or delivery*" of the message. The two contracts are directly opposed to each other. The petitioner contends that the *written* contract should prevail and that after finding that such written contract was made embodying the above conditions, it was not competent for the Court to substitute an *oral* contract which nullified it.

FURTHER CONFLICT BETWEEN THE WRITTEN CONTRACT OF TRANSMISSION AND THE ALLEGED ORAL AGREEMENT FIXING COMPANY'S LIABILITY FOR LOSS AND DAMAGE.

There appears this further conflict between the *written* stipulation and the alleged *oral* agreement as to defendant's liability in case of *delay*. By the terms of the Agreed Statement, it is admitted that the lines of the Western Union Company terminated at Wabuska, in the State of Nevada, and that the message had to be forwarded "thence by telephone over the line of the Yerington Electric Company to Yerington" (Tr., p. 67), and by Finding XIII (Tr., p. 56) the

Court found "in order to transmit the telegram in suit by telegraph or telephone beyond Wabuska, it was necessary that it be forwarded from that point over the line of the Yerington Electric Company to Yerington." The written stipulation upon the message blank (Tr., p. 54), provides "and this the company is hereby made the agent of the sender *without liability*, to forward any message over the lines of any other company when necessary to reach its destination." By the terms of the oral contract, however, alleged to have been made with the defendant's clerk, the defendant was to be liable for *all loss and damage* for failure to make an immediate delivery of the message at Yerington, although it was necessary to forward it over the lines of another company. If the defendant by this oral agreement was to be liable for all such loss and damage in case the message were not delivered immediately at Yerington, then obviously it was not to be forwarded over the lines of the other company *without liability as the written contract provided*.

As the entire question relating to the validity of the oral contract of insurance was dealt with by the Honorable Circuit Court of Appeal in a single paragraph of this opinion, we quote it here in full:

"We do not believe that it was necessary that there should have been a written contract of insurance. A contract to insure specially the correctness in the transmission of a message must be made in writing; but there is no regulation which re-

quires a written contract to insure the delivery of an unrepeatd message. We think a fair implication is that an oral contract may be made between the sender of a message and the telegraph company, whereby the company, for a consideration paid, may insure the prompt transmission and delivery of a message."

It will be observed that the Court says that

"An *oral* contract may be made between the sender of the message and the telegraph company whereby the company for a consideration paid, may insure the prompt *transmission and delivery* of the message."

But if for a consideration the parties have entered into a *written* contract determining what shall be the measure of damage in case of "*delay in transmission or delivery*" of the message (providing the written contract is valid, which will be the second point discussed in this brief), then a contemporaneous verbal contract, even though based on a consideration, defining a different measure of damage for the same thing, that is, for "*delay in transmission or delivery*," is void.

The whole of the written contract relates to the question of damage, and so with the oral contract. Therefore, the oral contract cannot be considered unless the written contract, with which it is in direct conflict, is brushed aside. The written contract provides in express terms that the message was

to be transmitted "subject to the terms hereof." The language is:

*"Send the following message subject to the terms on the back hereof, which are hereby agreed to."*

It follows that the message could not have been sent subject to some different and contradictory terms, or conditions agreed upon orally.

It is said in the opinion of the Circuit Court of Appeals, that the contract to insure the correctness in *transmission* must be in writing, but "there is no regulation which requires a written contract to insure the *delivery* of an unrepeatd message." We respectfully contend that this is error. The message is not transmitted to the addressee correctly or at all, until it has been received by him, that is, until it has been delivered. The agreement to transmit a message to the addressee involves the obligation to deliver it to him, otherwise he is not interested in its transmission. The provision of the message blank, relating to insurance, is clearly intended, when the premium is paid, to impose upon the telegraph company the obligation to deliver to the addressee a correct copy of the message. The delivery of an incorrect copy of a message though the same had been correctly transmitted over the wire would be a violation of the agreement; certainly therefore, it would not be contended that no delivery at all would be a compliance with the agreement. If the company accepted a premium of \$112.50 in

consideration of the insurance of "correctness in the transmission of a message," and failed to make any delivery at all it would not be heard to say that it never insured the delivery but only the transmission.

The message contract or stipulation provides for three classes of messages which may be sent, and for the liability assumed by the company in each class, and also makes provision to insure correctness in transmission *to the addressee at the rate of one per cent. of its value*. And in respect to the insurance, the agreement provides that "no employee of the company is authorized to vary the foregoing." The effect of the decision of which we complain is to authorize any receiving clerk of the telegraph company in the many thousands of offices it maintains, to bind the company by any agreement he may chance to make, and for any consideration he may choose to accept for *insuring against loss and damage*, however large may be the risk and however small may be the premium. We have in the present case an illustration of the effect of such rule. It is alleged and found that the receiving counter clerk, for the consideration of 47c, insured the plaintiffs against loss and damage in the sum of \$11,250, whereas the prescribed rate for insuring what we contend has always been construed to mean the delivery to the addressee of a correctly transmitted message, is one per cent. of the value, which in the present instance on the basis of damage claimed, would be \$112.50. *Obviously the sender would have no motive for insuring transmission to the terminal*

*office unless the transmission was to include the delivery.*

The plaintiffs below attached much significance to the fact that the words "Deliver immediately" were written on the face of the message. The word "Rush" is the term generally employed in respect to urgent messages, but the witness Quinn, the clerk who received the message, testified he thought the words "Deliver immediately" would have more of a tendency to hasten the delivery than the word "Rush," but also said that he charged for these two extra words (Tr., p. 133).

Closing this portion of the argument, we respectfully urge that the *Court erred in holding that the message was transmitted under the alleged oral agreement of insurance.*



## SECOND:

Was the written contract embodied in the stipulations on the message blank, valid?

THE WRITTEN STIPULATIONS UPON THE TELEGRAPHIC BLANK RELATING TO THE LIABILITY FOR DELAYS IN RESPECT TO MESSAGES, REPEATED OR UNREPEATED, TO WHICH THE PARTIES AGREED, AND DEFINING THE TERMS AND CONDITIONS UPON WHICH THE MESSAGE WAS ACCEPTED FOR TRANSMISSION, ARE VALID AND CONCLUSIVE OF THE RIGHTS OF THE PARTIES.

(Specifications of Error, I, II, III, IV, V, VI.)  
(Tr., p. 168-169.)

The Court found that the delay in the transmission of the message occurred, not at the terminal office, *but at an intermediate point*, that is, at some place between Reno and Wabuska, in the State of Nevada, or at least between Oakland and Wabuska. (Findings XIII and XV, Tr., pp. 56 and 58.) By Finding XIII it appears that the Western Union lines extended from Oakland to Wabuska, and by Finding XV, the Court held that the defendant "neglected to transmit said message to said Wabuska until May 2d, 1907."

What is the effect of the stipulation in such case, where the message is delayed at an *intermediate point*?

There has been much controversy throughout the various state courts over the validity of the above

clause of the message contract relating to the liability of the telegraph company for *delays* in the transmission and delivery of unrepeatd messages. But the question has been settled in this Court and in some of the Circuit Courts, and recently by the Interstate Commerce Commission, which by Act of Congress has been given primary jurisdiction over the reasonableness of such regulations. It is settled in the State of California and by the weight of judicial authority in other states that in such case such stipulation is valid.

*In Primrose v. Western Union Tel. Co., 154 U. S., 1, this Court held that the provision of the message contract relating to unrepeatd messages is valid.*

Attempt is frequently made to distinguish the *Primrose* case on the ground that the damage complained of arose from error in transmission and not from delay. Such is too narrow a construction of the full and elaborate opinion given by this Court upon the reasonableness and validity of the stipulations here in question. The validity of the stipulation was not upheld on the ground that the repetition of the message would have corrected the error. The Court did not decide whether it would or would not have done so, but the stipulation was upheld upon the broader ground of the right of a carrier to make reasonable regulations for limitations of its liability. The stipulation, it was held, *was not a contract for*

*exemption from liability for negligence*, but on the contrary the Court said:

"The party sending the message has the option to send it in such a manner as to hold the company responsible or to send for a less price *at his own risk*."

What is said in the *Primrose* case, and in fact, the whole theory of the decision, applies as well to *delays*, and especially to *delays in transmission between intermediate points*, as to errors of transmission. The Court by this decision reviews the cases from the various States upholding the provision in question and then deals specially with the reasoning of those cases declaring the provision invalid, and particularly the case of

*Tyler v. Western Union Telegraph Co.*, 60 Ill., 421.

Some of the cases it reviews are those relating to *delays in delivery*.

For convenience, we quote here the pertinent passages in the decision of the Court in the *Primrose* case, 154 U. S., 1. At page 15 the Court says:

"By the regulation now in question the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated *and to pay half as much again as the usual price in order to hold the company liable for mistakes or delays in transmitting or delivering*, or

for not delivering a message, whether happening by negligence of its servants, or otherwise."

And again quoting from *Camp v. Western Union*:

*"There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility."*

And quoting from Chief Justice Christiancy in *Western Union v. Carew*:

*"The regulation of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for the lower rate of charge and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question."*

The Court then reviews the decisions which hold the stipulation to be invalid and replies specifically to the case of *Tyler v. Western Union Telegraph Co.*, which is selected as containing "the fullest statement

of reasons, perhaps, on that side of the question." Replying to the argument, the Court says:

*"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again, if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message."*

The Court further says:

*"The conclusion is irresistible that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence."*

The Court will observe that while there is a subsequent reference in the opinion to the stipulation against liability for errors in cipher messages, the decision as to the validity of the stipulation is not based upon the fact that the message was in cipher, but directly upon the proposition that the stipulation against liability for error or *delay* with respect to unrepeatd messages, is valid as a whole, as a reasonable and proper limitation of the carrier's liability. Such is the reasoning of the case and it is based upon authorities, some of which relate to errors in trans-

mission and some to *delays in delivery*, but both of which line of cases are cited with approval. Besides, the Court holds that the right of telegraph companies to restrict their liability by contract is the same as of railroad companies, with which *no question of repetition is involved at all*. It is said in the *Primrose* case, pages 27-8, as follows:

"Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in *Hart v. Pennsylvania Railroad Co.*, 112 U. S., 331, 343."

It is needless to urge that the principle here under discussion was not involved in the *Primrose* case, for the Supreme Court itself decided that it was. The case is not to be distinguished on the ground that the message was in cipher, or that the error was in transmission. The controlling principle of the case is, that the telegraph company has the right

*"To fix that rate for those messages which may be transmitted at the RISK OF THE SENDER, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message."*

That the principle of that decision was broad enough to include *delays*, as well as errors of transmission appears, further, from the decision of the United States Circuit Court of Appeals in cases cited below.

We respectfully urge that the opinion of the Honorable Circuit Court of Appeals in the instant case is in conflict with the principles of the *Primrose* case.

THE DECISION ALSO IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEAL FOR THE EIGHTH CIRCUIT AND THE FIFTH CIRCUIT.

### Eighth Circuit.

*Western Union v. Coggins*, 68 Fed., 137.

In that case, *the damages arose solely from delay*, and the decision on this point was based solely upon the *Primrose* case. Upon authority of the *Primrose* case, the judgment which had been entered in favor of plaintiff was reversed. "The plaintiffs alleged the defendant negligently failed to *deliver* the message, and by reason thereof, Farris failed to pay, etc., whereby plaintiffs were damaged." See Statement of Case, p. 138.

There were other questions in the case relating to the rule of damages, but with respect to the stipulations upon the message blank concerning *delays in delivery*, the Court said (p. 138-9):

"This case was brought and tried before the case of *Primrose v. Telegraph Co.*, 154 U. S., 1; 14 Sup. Ct., 1098, was decided. Since the decision in that case it has been settled law in the Federal courts—First, *that the conditions contained in the stipulation quoted, subject to which the unrepeatd message of the plaintiffs was sent, are reasonable*

*and valid; second, that, under these stipulations, the telegraph company is not liable for mistakes in the transmission or delivery, or for the non-delivery, of an unrepeatd message beyond the sum received for sending the same."*

And further:

*"The decision of the Supreme Court in the case of Primrose v. Telegraph Co. silences further contention on these questions in the Federal courts."*

Fifth Circuit.

The Circuit Court of Appeals in the present case cites the case of

*Box v. Postal Tel. Co.*, 165 Fed., 138, in the Fifth Circuit.

We contend that upon the record of that case, the decision in *Box v. Telegraph Co.* is directly in point for petitioner herein. The holding of the Court there was in accord with the latest decision of the Supreme Court of California in *Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal., 316, herein-after referred to. It is said that the regulation with respect to repeated messages should be construed to refer only to such *delays* as could be *avoided by repetition* and comparison. In the instant case, the delay occurring at an intermediate point is, as the Supreme Court of California states, the precise condition the regulation applies to. In the *Box* case the message was never transmitted at all, and no attempt was made to transmit it, although upon inquiry, plaintiff therein



was erroneously informed that the message had been transmitted and delivered. The Court said, and this was the point of the whole case, that

"It is difficult to believe that this stipulation was intended by the parties to be applicable to a case in which the conduct of the company made it impossible for the message to be repeated."

In the present case the message was started. It was delayed at an *intermediate point*. It is obvious that the delay would have been avoided by repetition. We earnestly contend that the case of *Box v. The Telegraph Co.* is directly opposed to the decision in this case when applied to the facts, as shown by the record.

## INTERSTATE COMMERCE COMMISSION

THE DECISION IS IN CONFLICT WITH THE RECENT RULING OF THE INTERSTATE COMMERCE COMMISSION, WHICH IS GIVEN JURISDICTION BY THE ACT OF CONGRESS BY AMENDMENT OF JUNE 18, 1910 (Stat. L., 544, p. 309), TO DETERMINE THE REASONABLENESS OF THESE STIPULATIONS.

This Act of Congress confirms and ratifies the right of telegraph companies to make reasonable classifications of messages and charge different rates therefor. Section 1 provides as follows:

"That messages by telegraph, telephone, or cable, subject to the provisions of this Act, may be classified into day, night, *repeated*, *unrepeated*, letter, commercial, press, Government, and such other

classes as are just and reasonable, and *different rates may be charged for the different classes of messages.*" (36 Stat. L., 544, 545.)

*Cultra v. Western Union Telegraph Co.,*

decided May 17, 1917, and reported in the Interstate Commerce Commission decisions, 44 I. C. C., p. 679. While the message in question was sent before the amendment to the Act of Congress, yet the stipulations in question in both cases are the same, and if they are reasonable and valid limitations now under the present Act of Congress which expressly approved the classification of messages, they were reasonable and valid at the time the message in the suit was sent. We invite the Court's attention to the entire body of the opinion in this case. Portions which are pertinent to the decision here are as follows: (*Italics ours.*)

"Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeatd message, the rates for repeated and special value messages being built upon it. The unrepeatd rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeatd rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred, through error or delay in the transmission or delivery of the message, to the extent of fifty times

the rate charged, with a maximum of \$50. For a long time also the defendant has maintained still higher charges under which, upon the payment of one-tenth of 1 per cent. of the amount of the assurance desired, the defendant, within the value so placed upon the message, assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeatable rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay, while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves.

"The complainants contend that rates, and rules of this kind affecting the rates, that limit the liability of a telegraph company for error in transmission are unreasonable, because it is the duty of such a carrier, under the charges paid to it, to transmit all messages correctly. This theory assumes that the rate for an unrepeatable message must necessarily embrace the obligation to transmit it correctly and to respond in damages for the failure to do so. On that point in *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 25, it is said:

"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery, or in the non-delivery of a message.'"

And again:

"As has been said, the complainants cite many cases in which restrictions upon the liability of this defendant under its several classes of rates have been considered and the restrictions are variously referred to as unjust, unconscionable, without consideration, utterly void, or as being contrary to sound public policy. We are asked by the complainants to announce the latter principle in this case. On the other hand, the defendant cites an equal number of cases in which courts of great authority have upheld the restrictive rates. We shall not undertake to review any of these cases here. It will suffice to say that, apart from the Federal legislation now under consideration, the complainant's action, if brought in some State courts would apparently meet with success, while if laid in the courts of other States would result in failure. This lack of uniformity among the courts, when dealing with the defendant's rates and the rules and regulations affecting its rates for the transmission of interstate messages, to some extent may explain the legislation by which the Congress has put all telephone and telegraph companies engaged in the interstate transmission of messages under our jurisdiction. *But whatever may have occasioned the amendatory legislation, one of its necessary consequences, under the language used, has been to put an end to this diversity in results; so that, as will be seen further along in this report, the charge as fixed and offered to the public by the defendant for transmitting an interstate message may no longer involve any greater or less liability in one forum than it does in another, but must be construed as attaching to the defendant's error the same degree of responsibility in all the courts.*"

And again:

"Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfully fixed and offered to the public they are binding upon the defendant, and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and Federal courts. In *Boyce v. Western Union Telegraph Co.*, 89 S. E. (Va.), 106, 108, it is said:

" . . . Congress, by the act of June 18, 1910, seems to recognize the necessity and validity of such stipulations and to authorize the making of such contracts with respect to repeated and unrepeatd messages.

" . . . So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeatd and to charge different rates for each; in other words, to enter into the very contract which was made in this case.'

"See also, to the same effect, *Western Union Telegraph Co. v. Dant*, 42 App. D. C., 398; *Western Union Telegraph Co. v. Bank of Spencer*, 156 Pac. (Okla.), 1175, 1179; and *Haskell Implement & S. Co. v. Postal Telegraph-Cable Co.*, 96 Atl. (Me.), 219, 223."

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE RECENT DECISION OF THE SUPREME COURT OF CALIFORNIA IN UNION CONSTRUCTION CO. V. WESTERN UNION TELEGRAPH CO. 163 Cal., 298.

There are many decisions of the State and Federal courts holding that this repeated message clause of the contract is valid in the case of *delays*. There are many other decisions holding that this clause is not valid as against delays occurring after the transmission of the message was complete but is valid as to delays at intermediate points. The decision of the Circuit Court of Appeals in this cause, holding that the above mentioned clause of the contract was not a defense to the delay in this case shown and admitted to have occurred at the intermediate point on the company's telegraph line, is directly in conflict with the recent holding of the Supreme Court of California in the case of

*Union Construction Co. v. Western Union Telegraph Co.*, 163 Cal., 298.

The decision of the Court on this question, is found in the following statement, at page 316, where after reviewing the decisions relating to delays, the Court says:

"For this reason it (the provision of the contract in question) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message from the company's desk where

it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee." (*Italics ours.*)

In the present case, the Court found that the delay occurred at *an intermediate point between the sending and receiving offices*, which obviously could have been avoided by repetition (Tr., p. 58). The Supreme Court of California decided in the above case that the message contract had direct application to such case. *The defense was denied to petitioner here by the decision.*

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS  
IN CONFLICT WITH THE WEIGHT OF AUTHORITY IN  
THE STATE COURTS.

Whenever the question has been raised, the decisions in those States which have upheld the stipulation as to errors in transmission have also upheld and applied it to *delays in delivery*, especially when occurring at intermediate points. These States are New York, Massachusetts, Michigan and Rhode Island.

MASSACHUSETTS. We will first direct the Court's attention to the decisions of the Supreme Court of Massachusetts on this question. In *Ellis v. American Telegraph Co.*, 95 Mass., 226, it was held that the stipulation was a reasonable and valid limitation of liability and constituted a binding contract. In that case the error complained of was a mistake in

transmission, but in a dictum as will afterwards appear, the Court said: "The defendant might be liable for such damages as would not be prevented by the compliance with the rules," which is the contention here. Later, in *Grinnell v. Western Union Telegraph Co.*, 113 Mass., 299, relying on the above dictum and to overcome the effect of the stipulation, the *plaintiff offered to prove that the repetition of the message would not have prevented the error*. The Court held the stipulation was valid but with respect to the evidence that a repetition would not cure the error, said that the above statement in the *Ellis* case was *dictum*, and ruled that the evidence "was rightly rejected as immaterial" (see page 306). The error in that case also, was one of transmission.

But again later, in the case of *Clement v. Western Union Telegraph Co.*, 137 Mass., 463, the same question arose as in the case now before the Court, concerning the effect of the stipulation where *the only negligence complained of was delay in delivery*. As that case presents the exact point at issue, we quote at some length. The Court says, page 406:

"Plaintiff contends that as the auditor found that the defendant by its agent was guilty of gross negligence *in not delivering the message seasonably*, this stipulation does not exempt the defendant from liability for damages actually sustained.

"The only negligence shown in this case was the unexplained *delay in delivering* the message on the part of the messenger boy to whom it was, *after its receipt*, entrusted for delivery. It may be that the company might be guilty of some



fraudulent or gross negligence in transmitting or delivering a message, so that it would not be protected by its regulation from liability for actual damages, though in excess of the sum stipulated. *But the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount unless it receive a reasonable compensation for assuming further responsibility.*

"Without discussing the question as to what is the difference, if any, between ordinary and gross negligence we are of the opinion that the only negligence proved in this case was such negligence as the parties intended to include in their stipulation and that such stipulation as applied to such negligence is reasonable and valid."

The limitation of liability is not conditioned on the repetition of the message, but depends on the payment of the consideration.

The above case was cited with approval in *Pearsall v. Western Union*, 124 N. Y., 269, and in *Primrose v. Western Union*, 154 U. S., 21.

NEW YORK. New York is also one of the States which upholds the validity of the stipulation. In the following cases, the question arose as to whether it was valid if applied only to cases of delay:

*Kiley v. Western Union Telegraph Co.*, 109 N. Y., 231;

*Riley v. Western Union Telegraph Co.*, 28 N. Y. Supp., 581.

In the *Kiley* case the message was sent but not delivered. The Court said:

"That a telegraph company has the right to exact such a stipulation from its customers, is the settled law in this and most of the other States of the Union and in England (citing cases) . . . That they have the right to make reasonable regulations for the transaction of their business and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents and the mistakes and defaults incident to the transaction of their peculiar business. *The evidence brings this case within the terms of the stipulation.*"

In *Riley v. Western Union*, 28 N. Y. Supp., 581, the action was for *delay* in the transmission and delivery of a message. The Court held that in the absence of gross negligence or wilful misconduct, the stipulation was binding between the parties.

MICHIGAN. The validity of the stipulation is upheld in Michigan in *Western Union v. Carew*, 15 Mich., 525, where the error was in transmission. Later in

*Birkett v. Western Union Telegraph Co.*, 103 Mich., 361, 33 L. R. A., 404,

the Supreme Court was asked to recede from that doctrine in a case where the damage was caused by *delay*. The facts were that "At 10 o'clock plaintiff sent an unrepeatd message to the physician." "The message should have been delivered in about half

an hour but was not delivered until 2 o'clock P. M.  
*. . . Action to recover damages for defendant's failure to promptly deliver a telegram."*

The Court, after reviewing the authorities, says:

"It is therefore clear that in order to hold this regulation which was a part of the contract, void, we must not only overrule the decision of our own court *but must run counter to the great weight of authority."*

In that case the same argument and the same authorities were pressed upon the attention of the Court as are now urged in this case. The Court further says:

"It is further argued by the learned counsel for the plaintiff *that the repetition of the message would not have prevented the damage complained of and that, therefore, the failure to have it repeated does not protect the defendant from liability."*

With respect to this argument, after referring specifically to each of the cases cited in support of the contention, the Court again says:

"It is apparent, we think, that these decisions do not sustain the text of the learned editor, and throw no light upon the present controversy."

And again, page 407, the Court says:

"The precise question was again before that court (Mass.) in *Clement v. Western Union Telegraph Co.*, *supra*, when the message had reached the receiving office and had been entrusted to a messenger boy for delivery."

And after quoting the language of the Court in that case holding that "*the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation and there are no principles of public policy which should prevent the company from stipulating*" for a limitation of its liability, the Court says:

"This case is cited with approval in *Primrose v. Western U. Teleg. Co.*, *supra*.

"The question now before us is not one of neglect to transmit at all, nor of failure to deliver after receipt at the place of destination. It is a case of *delay in transmission*. It is obvious that such delays may occur from various causes. *There is as much reason in stipulating against such delays as there is against inaccuracies in the message. The demand for its repetition is a notice of its importance, and the necessity for promptness, additional to the language of the message itself.*"

RHODE ISLAND. *Stone v. Postal Telegraph Co.* (Rhode Island), 76 Atl., 762, was an "action by M. M. Stone & Co. against the Postal Telegraph Co. *for delay in delivery of telegrams.*" It was contended by plaintiff that the stipulation in question would not relieve the defendant of liability in cases of delay. The Court said:

"We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, *though the rule in-*

cludes a limitation of the company's liability for delay in transmission. The liability of the company under this agreement is graded in accordance with the compensation received for transmitting the message. Correctness in transmission, which from a consideration of the whole rule appears to include promptness in delivery, may be insured by a contract and the payment of an additional fee. All these provisions in the contract of sending, appear to be reasonable and within the right of the company to impose. As is urged in the argument of the defendant's counsel, the sender is fully aware how important the prompt delivery of his message is; the message as delivered to the company ordinarily gives no indication of its importance. If the sender desires to have special care expended upon it, it is not unreasonable to ask him to pay for such particular attention. Some messages may be of trivial importance. By negligence in the transmission or delivery of one message the damages incurred may amount to no more than the cost of sending the message. In respect to another message the damages might amount to a large sum. These facts are unknown to the telegraph company, but they are within the knowledge of the sender. In these circumstances, therefore, it is fair to allow the telegraph company to enter into some agreement with the sender for liquidation or ascertaining the damages which it may be called upon to pay, and grading its charges for the service in accordance therewith. If the company is to be held to a very small liability, as for the bare amount of the tolls, it can afford to transmit the message for a very small sum; but, if it may be held liable for large damages, it must, for its own protection, charge more for the service."

THE EFFECT OF THE STIPULATION IN RELATION  
TO DELAYS.

Does the stipulation upon the message blank apply to delays in transmission and delivery?

The Court of Appeals by its opinion held that the stipulation on the message blank with respect to un-repeated messages cannot be construed to apply to the case of delay, (Tr., p. 215), basing its opinion chiefly upon the case of

*Box v. Postal Telegraph Co.*, 165 Fed., 138.

Again referring to that case we contend that upon the record it is directly in point for the defendant. There are some cases such as *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal., 298, above referred to, which hold that after the message has been correctly transmitted to the terminal office, its repetition would not hasten its delay. In the *Box* case, *supra*, the message was never sent at all, and the Court held that "the message must of course be sent before it can be repeated." But the Court did not in that case decide that the stipulations upon the back of the message blank could in no case be held to apply to delays. On the contrary, it is said, at page 141, as follows:

"Although the regulation purports to be made against mistakes or delays, it should be construed to refer to such mistakes and *delays* as could be corrected or avoided by repetition and comparison."

In the *Union Construction Co.* case, the message was delayed after the transmission to the terminal office was complete. In the *Box* case the message was never sent at all. In the present case, Court found that the delay occurred at an intermediate point upon the defendant's lines, that is, between Reno and Wabuska in the State of Nevada. It was stipulated by the parties that the message reached Reno before 9:30 P. M. The trial court in its opinion said (Tr., p. 158):

"The message was sent upon its way and reached Reno in due course that evening and within due time was put upon the wires at the Reno relay for Wabuska, Nevada. And there it disappears."

If the message had been a repeated message, the failure of the Wabuska office to repeat the message, that is, to "telegraph it back" to Reno or the originating office, would have charged the Reno operator with knowledge that the message had not reached Wabuska and it would have been his duty to resend the message until it had been satisfactorily repeated from the terminal office at Wabuska. Both the *Box* case and the *Union Construction Co.* case hold that the stipulation in relation to delay does apply to the facts as presented by this case, that is, where the delay occurred at an *intermediate point* upon the defendant's lines, and where the delay would have been discovered and avoided if the message had been repeated back from Wabuska. In the *Box* case the Court said that the above stipulation does refer to such "delays as

could be corrected or avoided by repetition." In the *Union Construction Co.* case the Court said, as quoted above:

"For these reasons it (the stipulation) should be interpreted to provide only for *delays* and mistakes occurring in the forwarding of a message *from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee.*"

#### GROSS NEGLIGENCE.

*The Court erred in finding that defendant was guilty of gross negligence in the transmission and delivery of the telegram. (Findings XVI and XX). (Specifications of Error, XIV and XVI, Tr., pp. 174-5).*

The negligence which the Court designated as gross negligence in this case *occurred after the alleged damage was done*, that is, the three days delay in the delivery of the message occurred *after the money was paid*. We do not think it was proper for the Court in determining the degree of negligence to consider any act of the defendant, or any time which elapsed, after the draft was paid and the alleged damage had accrued. It is only the delay which permitted the payment of the draft which should be taken into account.

The finding of gross negligence is based upon the assumption that the draft was paid because the message was delayed *three days* and that a delay of three days



is gross negligence. But it was not the delay of three days which caused the alleged loss at all; it was the delay of not more than one hour, on the morning of April 30th. The Yerington office was not a night office. The message could not be delivered until morning. The testimony of plaintiff Hastings was that the company's agent "said that the message would be delivered without fail before banking hours the next morning" (Tr., 102). The office opened about seven o'clock A. M., but messages accumulating during the night at Wabuska had to be transmitted and delivered in turn. It should have been delivered when the bank opened at 8:30 A. M., at which time the bank received its mail. If the message was to accomplish its purpose at all it was necessary for it to have been delivered, as stated in the complaint, "before banking hours the next morning." A very brief delay would have rendered the message useless. After the bank received the mail, certainly after it had credited the draft, it is immaterial whether the message was thereafter delayed three days, or was never delivered at all. The cashier of the bank testified the draft was credited immediately (Tr., p. 111). Practically, therefore, the entire period of the delay of the message was after the draft had been paid. If the message had been delivered in time to intercept the draft, the delivery would have been prompt. Certainly the delay until after the bank had opened and the draft was paid was nothing more than ordinary negligence.

To illustrate: If the bank at Yerington had received its mail on the evening of April 29th, which Assistant Cashier Willis testified it might have done, or early on the morning of April 30th, the telegram, although promptly delivered, would have been ineffectual to stop payment of the draft. It would have been immaterial in such case how long thereafter the message was delayed. The draft was actually received between 8:30 and 9 o'clock. The question therefore is, was the delay in the delivery of the message until after that hour gross negligence?

If it were shown that the telegraph company, with all due diligence, could not have delivered the message before the bank opened, by reason of disturbance upon the lines or for any physical cause, there would have been no liability in this case by reason of the three days' delay after the message should have gone through. If any liability was incurred at all, it accrued when the bank received the draft on the morning of April 30th and credited it to accounts of Pitt and Campbell, which was but an hour, or thereabouts after it was possible to deliver the message. Negligence which occurred *subsequent* to the loss cannot be charged against the company. If, as said, by reason of storm, or other disturbance, the message could not have reached the bank before the opening hour on April 30th, there could not possibly have been any liability upon the telegraph company, even though after the draft was paid the message had been delayed for a month or not delivered at all.

Gross negligence implies wilful misconduct or reckless indifference to the rights of others, which is not to be presumed from a failure to deliver the message immediately or, in this case, before banking hours on the morning of April 30th.

In *Kiley v. Western Union Tel. Co.*, 109 N. Y., 231, the message was delayed or not delivered at all. The Court held that the failure was not due to wilful misconduct or gross negligence. This case was expressly approved by the Supreme Court of the United States in *Primrose v. Western Union Tel. Co.*, 154 U. S., 1, where the Court, speaking through Mr. Justice Gray, said, in reference to the Kiley case (p. 21):

"It was not shown that the failure was due to the wilful misconduct of the defendant or to defendant's gross negligence."

In the Primrose case itself the loss arose from an error instead of delay which, however, was charged to be gross negligence. The Court said, in this connection (p. 27):

"The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than *ordinary negligence*; and that upon principle, and authority, the mistake was one for which the plaintiff, not having the message repeated according to the terms printed upon the back thereof, and forming part

of his contract with the company, could not recover more than the sum which he had paid for sending the single message."

In *Birkette v. Western Union Tel. Co.*, 103 Mich., 361, the damage was caused by *delay*. The facts were "that at *ten* o'clock plaintiff sent an unrepeatd message to the office." "The message should have "been delivered in about half an hour, but was not "delivered until *two* o'clock P. M.—action to re—"cover damages for defendant's failure to promptly "deliver a telegram." It was held there was no gross negligence and the case came within the stipulation.

The cases of *Clement v. Western Union Tel. Co.*, 137 Mass., 463, and *Stone v. Postal Telegraph Co.*, 76 Atl., 762, were cases of delay in the delivery of telegrams which, however, in each case was construed not to be gross negligence. In *Williams v. Western Union Tel. Co.*, 203 Fed., 140, the negligence was in the transmission of the message. The Court said:

"There was no evidence of wilful misconduct or that any other want of care which would raise the presumption of a conscious indifference to consequences."

In *Halsted v. Postal Telegraph Co.*, 193 N. Y., 293, which was an error in transmission, the Court said:

"However occurring, if by no wilful misconduct, a mere mistake, or error, in the transmission of a message, would not warrant a jury in finding that there had been *more than ordinary negligence*."

. . . To justify a recovery in this case it was incumbent upon the plaintiffs to establish an absence of contributory negligence upon their part and *gross neglect upon the part of the employes of defendant. The onus thus imposed was not satisfied by proof of error in the transmission of the message.* . . . In the view we take of the evidence *it was the duty of the trial justice to hold as a matter of law that there was a failure of evidence to show gross negligence.* . . . The conclusions reached in this case do not tend to subject the public to the mercy of a telegraph company. While such a corporation is invested with certain privileges to be exercised by it for the public benefit, its liability must be measured by reasonable limitations. The opportunity is afforded to one doing business with it to protect himself from danger incident to error likely to arise. A failure to exercise the privilege extended at a small expense may result in a loss which might have been obviated by the injured party in the first instance. *To hold that under the facts in this case gross negligence had been established would enable a party in nearly, if not every case, to have a jury determine that a liability existed, when as a matter of fact only the absence of ordinary care was disclosed, and thus render telegraph companies liable as insurers of the accuracy of messages notwithstanding their contracts."*

We respectfully contend, therefore, that the Court erred in finding gross negligence against the company, based upon the delay which occurred *after the time the draft was paid*, which was practically the entire three-day period.

## THIRD.

THE CHARACTER OF THE CONTRACT OF PLAINTIFFS WITH  
PITT AND CAMPBELL FOR THE PURCHASE OF THE  
STOCK.

That plaintiffs suffered no damage by the delay, for the reason that their contract with Pitt and Campbell to buy the stock was an absolute agreement to "buy, take and receive" the shares of stock, and not an option.

The Court erred in finding and deciding that plaintiffs were damaged in the sum of \$11,250 by the delay. (Finding XX, Tr., p. 61). (Specification of Error XVI, Tr., p. 175).

THE CONTRACT OF LANGE AND HASTINGS WAS AN ABSOLUTE AGREEMENT FOR THE PURCHASE OF THE STOCK, FROM WHICH OBLIGATION THEY COULD NOT BE RELIEVED BY THEIR OWN DEFAULT.

If the agreement had merely provided that the first parties agreed to sell for a price named and upon terms stated, and that the "rights of all parties should cease and determine" upon default in payment of any installment, it would clearly be one of option. But plaintiffs' contract with Pitt and Campbell, on the contrary, provides "that said parties of the first part agree "to sell and deliver to the parties of the second part, "and said parties of the second part *agree to buy, take "and receive*, etc., upon the following terms and con-

"ditions." Then follow the terms and conditions of payment, namely, the price to be \$75,000, which shall be payable as follows: \$7,500 cash upon the execution of the agreement, the remainder in installments of \$11,250 each. Provision is then made for depositing the stock in escrow with the Lyon County Bank, to be delivered upon final payment, the further provision constituting the bank the agent of the *first parties* to receive the payments and grant acquittances therefor, and then the forfeiture clause, which the Court held converted the contract into one of option, which we contend was error. This clause, which we believe is only the usual form of forfeiture clause inserted in contracts for the benefit of the vendor, *does not provide that in default in payment* the rights of the parties shall cease and determine, but that in the event of any default in payment (1st) the bank shall be authorized to return the stock; (2nd) that all previous payments shall be forfeited, and (3rd) "that *thereupon* all rights of each of the parties hereunder shall forever cease and determine."

The construction which the Court put upon the contract we respectfully contend renders meaningless the agreement of the purchasers to "buy, take and receive" the stock. It gives the contract the same meaning it would have if that covenant were not in it. Under the ruling such a contract containing an agreement to buy, would impose no greater obligation upon the purchaser than does a contract which does not contain such agreement. *By* such ruling such covenant

to buy and pay can be left out or put in without in any manner changing the meaning of the contract. We contend, and the authorities without serious exception hold, it is that clause, and not the forfeiture clause which determines whether the agreement is a contract to buy, or a mere option or privilege to buy.

If the Pitt and Campbell contract, without other alteration, had been only an agreement to *sell*, and Lange and Hastings had failed to make the payments, as prescribed, the seller would have had no other remedy than to retake the stock; but by the insertion of the covenant to "buy, take and receive" the stock, the seller was given the option upon default to enforce that agreement, or to recover the stock. If the purchaser agrees to buy and to pay the price named, he cannot relieve himself from this obligation by failing to do it. This has been the uniform interpretation put upon forfeiture clauses in contracts which contain the absolute obligation to buy.

THE RIGHTS OF THE PARTIES UNDER THE TERMS OF THIS AGREEMENT CEASED, NOT UPON THE DEFAULT IN PAYMENT, BUT UPON THE RETURN OF THE STOCK.

The bank was not directed nor compelled to return the stock upon default in payment; it was only given authority to do so. The previous payments made by the purchasers would not be forfeited under the contract until the sellers had reclaimed the stock. The words of the contract "that thereupon all rights, etc., shall cease," do not relate to the default in payment



but to the return of the stock. We interpret the transaction to mean that Lange and Hastings by their contract agreed that if payment was not made, Pitt and Campbell would then have a right to retake the stock, and in such case the bank was authorized to deliver it, and "thereupon all rights of the parties should cease." Certainly the purchasers, who were in default, could not direct the bank to return the stock. That right was with the seller. If all the rights of all the parties ceased upon the default in payment, *then even the right of Pitt and Campbell to the return of the stock ceased.* If the purchasers failed to make a payment which was due on the first day of the month, then the sellers, under the construction given the contract, could not on the 2nd, nor the 3rd, nor at any time thereafter, claim the stock, because, as argued, their rights had ceased upon default in payment. Clearly, they had the right to receive the stock, and *this right was derived from the contract* and could be exercised at any time *after* the default in payment. The stock was delivered to the bank and was *endorsed*. The bank had no authority to deliver to any one, except under the contract. Upon default in payment the bank was authorized to deliver the stock, but the rights of the vendors under the contract did not cease upon default in payment. It would cease only after they had received the stock and thus worked the forfeiture of the previous payments. The contract provides that *thereupon* the rights of parties cease. Until then the plaintiffs were under contract to buy, because

by the terms of the contract *they had agreed to buy* and the payment on April 30th was a payment they were obligated by the contract to make.

*This is important because there is no evidence that the stock has ever been returned to Pitt and Campbell or that they had ever demanded its return. It was found that plaintiffs made no further payments, but there is no evidence that Pitt and Campbell refused or would refuse further payments, or had terminated the contract by retaking the stock.*

#### THE CONTRACT OF SALE.

We urge the Court was in error in holding that the contract with Pitt and Campbell was one from which the plaintiffs could withdraw at pleasure. On the contrary, as it contained *an agreement to buy*, it was a contract which Pitt and Campbell had a right to enforce and the condition regarding default did not affect that right.

In interpreting this contract, the Court, in its opinion, says (Tr., p. 212):

“When default occurred immediately the authorization to deliver became effective, forfeiture accrued and all rights of Hastings and Lange and Pitt and Campbell under the contract ceased and became determined.”

We respectfully contend that this is not consistent with the language of the contract. While it is true that the “*authorization*” became effective upon default,

that is, the bank, upon default, was *authorized* to deliver, yet the rights of the parties did not cease when the bank became clothed with the authority to deliver but when that authority was exercised and delivery made.

#### NO DELIVERY MADE.

The Court, however, holds that it became the *duty* of the bank to return the stock upon default in payment, or, in other words, that it was *required* to deliver it. But such is not the contract. There is no requirement that the bank deliver it. There is no provision that upon default the bank *shall* return the stock, but only that the bank is authorized or, in other words, that it *may* return the stock upon default, and that "thereupon," clearly meaning upon the return of the stock, all rights shall cease. The Court however said that "thereupon" relates to the default and that it then became the duty of the bank to return the stock and Pitt and Campbell had no alternative but to accept it. But we earnestly insist that the word "thereupon" means, and was intended by the parties to mean, that the rights of the parties should cease and determine upon the *return of the stock*. This is clear for the following reasons: There was no need for Pitt and Campbell to authorize the return of the stock *upon default* in payment. The stock was their property anyway. They had the right by *ownership* to its return upon default in payment without agreement or authorization from themselves.

But while Pitt and Campbell had the right to take the stock, *they also had the right not to take it, but to insist upon the enforcement of the contract and the payment of the price which Lange and Hastings agreed absolutely to pay.*

These are the conditions subject to which Pitt and Campbell agreed to sell and Lange and Hastings agreed to buy. To hold that the absolute agreement of Lange and Hastings to buy the stock and to pay the stipulated price therefor was made upon condition that they could withdraw if they chose, means only this: That they agree to buy subject to the condition that they buy, or that they agree to pay provided they pay, and they are not deemed to have agreed to pay if they do not pay, which, of course, means nothing.

#### THE RIGHTS OF PITT AND CAMPBELL UNDER THE CONTRACT.

The whole question here seems to resolve itself to this: Could Pitt and Campbell in the case of non-payment, maintain an action upon the contract to collect the amount due? Plaintiffs claim that the rights of Pitt and Campbell ceased when the purchasers failed to make the payment. But the right to have the payment made was the only affirmative right which Pitt and Campbell had under the contract. If they did not possess this right, then they had no rights which could cease or determine upon the failure to pay, except the right to receive stock, which, it

must be admitted, did not cease on default in payment. The plain meaning of the clause is that if, upon failure to pay, they take back the stock, which the bank is authorized to return, *then* the right of Pitt and Campbell to have these payments made would cease and determine. In other words, if the contract were an option only, the vendors had no rights to cease or determine at any time. This would be true if the contract provided only that Pitt and Campbell agreed to sell; and contained no covenant to buy. But if Pitt and Campbell had no right to enforce the payments provided for, then the agreement of Lange and Hastings "to buy, take and receive" the stock and pay the price agreed upon, had no significance and was entirely without meaning.

Plaintiffs state, however, that they agreed to buy "upon terms and conditions." But in all contracts where the seller agrees to sell and the buyer to buy, and the price and terms and conditions are stated, the contract is made upon those terms and conditions. It adds nothing to the meaning of the agreement to state that it is made upon those terms.

#### THE FEDERAL AND STATE AUTHORITIES ON THE CONSTRUCTION OF SIMILAR CONTRACTS.

There is an abundance of cases reported, relating to contracts in which the forfeiture provides that upon default in payment the rights of the *purchaser* shall cease, or that the contract shall be null or void at the *election of the vendor*. These authorities are of no

value here and we have cited none. In our review of the cases, we shall refer only those which provide that upon such default *all the rights of the parties* shall cease or such contract be void and of no effect.

In the recent work of *James on Option Contracts*, the author, at Section 109, under the topic of "Option Distinguished From Agreement of Sale," states the rule as follows:

"Where the parties mutually stipulate the seller to sell and the buyer to buy, and it is further stipulated that if the buyer fails to perform, he shall forfeit certain payments made and the agreement shall be void, the instrument should be construed as an agreement of sale, that is, as binding upon the vendee to purchase and the forfeiture clause as a penalty and, therefore, for the sole benefit of the vendor. Otherwise it would be within the power of the vendee, by his own default, to terminate the agreement without liability to the vendor."

In

*Stewart v. Griffith*, 217 U. S., 323,

the forfeiture clause was fully as comprehensive as in the present case. The question here involved is exhaustively considered and especially the meaning and effect of such clause in connection with the *covenant of the purchaser to buy*. The contract in that case provided:

"If such balance be not paid on a specified date, the amount paid is to be forfeited and the contract

of sale and conveyance to be *null and void and of no effect in law.*"

The chief consideration of the Court was to determine whether the contract did contain *an obligation to buy*. Without that covenant the contract would be construed to be void as to both parties. With such agreement it would be void at the election of vendor. The Court says (p. 328):

"It is said that the *defendant made no covenant*, and therefore was free to withdraw if he chose to sacrifice the \$500 that he had paid. This contention should be disposed of before we proceed to the other questions in the case."

and, p. 329:

"The tenor of the 'agreement' throughout imports *mutual undertakings*. The \$500 is paid as 'part purchase price of the total sum to be paid'; that is, *that the purchaser agrees to pay*. The land is described as 'being sold.' There are words of present conveyance, inoperative as such, but implying a concluded bargain, like the word 'sold' just quoted."

and again, p. 329:

"Here is an absolute promise in terms which it would be unreasonable to make except on the footing of a similar promise as to the main parcel that the purchaser desired to get. *We are satisfied that Stewart bound himself to take the land*. See *Wilcoxson v. Stitt*, 65 Cal., 596, 52 Am. Rep., 310, 4 Pac., 629; *Dana v. St. Paul Invest. Co.*, 42 Minn., 195, 44 N. W., 55. The condition

plainly is for the benefit of the vendor, and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice. *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S., 234, 24 L. ed., 689; *Oakes v. Manufacturers' F. & L. Ins. Co.*, 135 Mass., 248, 249; *Titus v. Glenn Falls Ins. Co.*, 81 N. Y., 410, 419."

The contract under consideration by this Court in the *Stewart* case provided that if the balance be not paid the contract was to be "*null and void and of no effect in law.*" The balance was not paid, but this Court held that the vendor nevertheless could maintain an action upon the contract for the purchase price.

One of the leading cases which has been widely quoted is

*Wilcoxson v. Stitt*, 65 Cal., 596.

Quoting from the decision in *Mason v. Caldwell* (p. 598):

"The defendant contends that he can take advantage of this clause, and because he did not pay the money as he had agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor should have the same privilege. This argument refutes itself. It is as much a *felo de se*, as it would make the bond. To admit the de-



fendant's position is to leave everything in his own hands. It allows him to defeat, or make the bond operative, as may best subserve his interests, without any discretion on the part of the obligee. It converts the bond into a naked proposition, absolutely binding on the seller, but which the purchaser may accept or reject by the payment or non-payment of the money. By thus putting the entire control in the hands of the latter, all mutuality is destroyed. *It was the undoubted intention of both parties when they inserted this clause to provide a penalty to insure a prompt performance by the purchaser."*

The contract in the Wilcoxson case provided that upon *default of payment*, "this agreement shall be void." The contract under consideration provides that in default in payment the bank shall be *authorized to return the stock* and the previous payments shall be forfeited, and "thereupon" all rights of each of the parties shall cease. A contract becomes void when the rights of the parties thereto have ceased, and conversely when rights of all parties have ceased, the contract has become void. The terms are synonymous. If in the Wilcoxson case the contract was merely voidable at the election of the vendor, the same meaning must be ascribed to the equivalent expression in this case, and the rights of the parties hereto be held to "cease and determine" at the election of the seller and not of the party who is in default.

In *Central Oil Co. v. Southern Refining Co.*, 154 Cal., 165, there was a mutual agreement to buy and to

sell certain quantities of oil upon conditions of payment specified, as in the present case. The contract contained this clause:

"The violation of any of the terms or conditions thereof by *either* party hereto shall work a forfeiture hereof. This agreement shall thereupon become void and of no effect."

The defendant, the Southern Refining Co., refused to take or pay for oil and the plaintiff sued for breach of the contract. The Court says (pp. 166-167):

"Upon appeal appellant's first and principal contention is that by force of the terms of the contract itself, when defendant violated it, the agreement became 'void and of no effect'; that this provision means that the violation terminated the contract and that consequently plaintiff had no right of recovery under it. Clearly appellant misconstrues the force of the language upon which it relies. That language means that by a violation of the terms of the contract the rights of the party violating it cease, and as to that party and to that extent, the agreement becomes void and of no effect. It would be an extraordinarily unreasonable construction to give the language the meaning for which appellant contends. It would work the destruction of the contract itself and leave this solemn writing as an expression of the mere whim of the parties, for '*a promise which is made conditional upon the will of the promisor is generally of no value, for one who promises to do a thing only if it pleases him to do it, is not bound to perform it at all*' (9 Cyc. of L. & P., p. 618). Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights

of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party (*Civ. Code*, secs. 1511, 1512, 1514). Such has uniformly been the construction put upon language such as this when found in contracts."

*Under this type of agreement it would be just as permissible for the seller after full payment, to be relieved from his obligation to convey, by refusing to convey, as it would be for the purchaser to be relieved from his obligation to pay by refusing to pay.*

In *Weaver v. Griffith* (Pa.), 59 Atl., 315, the forfeiture clause was even stronger than in the present case, because it provided that upon *default in payment only*,

"The agreement is to be null and void *and all* parties are to be released from *all liabilities* hereunder and all money previously paid forfeited."

The Court in that case held that the failure to make the payments at the stipulated times *did not of its own force terminate the contract*. As the opinion is in one paragraph and is confined to the construction of the above clause of the agreement, it is quoted here in full:

"The defendant might have terminated the contract under the clause that 'In case the said party of the second part doth not make payment as above specified at the time herein stated then this agreement is to be null and void, and *all* parties are to be released from *all* liabilities herein and

all money previously paid forfeited.' But the failure to make the payments at the stipulated times did not, *of its own force, terminate the contract*. It was not one of option, but of sale and purchase, and *prima facie* the time of payment was not of its essence. While a contract may provide that it shall be terminable at the will of either party, so that a purchaser may even terminate it by his own default, yet such effect will not be given to it unless the intent of both parties to that effect be made apparent by clear, precise, and unequivocal language. The presumption is that the forfeiture clause is for the benefit of the vendor, and enforceable at his election. Without such election and action the purchaser would not be released from his obligation to pay, and equally the vendor would continue to be bound by his agreement to sell. In the present case the court below found as a fact that the defendant had not elected to enforce his right of forfeiture, but by his conduct had substantially waived it. Thus retaining his right to enforce the contract against the purchaser to buy, he equally kept alive his own obligation to sell.

"Decree affirmed."

It will be remembered that the agreement with Pitt and Campbell under consideration does not even provide that the rights of the parties should cease on failure to pay, because very important rights were still to be exercised. It, in effect, provided that the rights should cease upon the return of the stock, which the evidence *does not show has ever been returned*, or that the vendors took any action to forfeit the previous payment. Under the Weaver case, *supra*, even if the contract in suit had provided

that the rights of the parties should cease upon failure to pay, the contract would not "of its own force" have been terminated. The option in such case would be with the seller.

In *Vickers v. Electrozone Co.* (N. J.), 48 Atl., 606, the Court was construing a provision of the contract:

"By force of which (in terms) the failure by the party of the second part to perform the agreement *ipso facto* puts an end to it,"

and said:

"It would be an extraordinary construction of this agreement to make it confer upon a party the power to make his own default in not performing his part of the agreement the discharge of his obligation to perform it."

We also call the Court's attention to the language of the courts in the English cases cited in this opinion.

Also in the case of

*Hamburger v. Thomas*, 118 S. W., 770,

the Court in construing the forfeiture clause, had first to determine whether the contract contained an agreement to buy. The option clause provided that if the title to said property, in the opinion of the purchasers, was good and said property was not taken within the time specified "then the \$1000 herein receipted for shall be forfeited to W. W. Thomas and ourselves equally as liquidated dam-

"ages, and this receipt shall then be null and void  
 "and all parties herein named released." The Court  
 held that the contract was not an option but a con-  
 tract of sale which could be enforced by either  
 party. It is said (p. 773):

"This is not a mere 'option' by which is meant  
 a contract by which the owner of the property  
 agrees with another that he shall have the right  
 to buy his property within a certain time. By  
 this (meaning an option) the owner does not sell  
 his property nor agree to sell it, but sells simply  
 the right or privilege to buy at the election of  
 the other party (citing cases). But, as is before  
 said, it is a contract of sale. It shows a contract  
 which, upon its breach, the other can enforce."

The rule in regard to insurance contracts is that  
 the usual forfeiture clause providing that upon the  
 failure to pay the premiums at the time stated, the  
 contract is to be null and void, is a provision inserted  
 for the benefit of the insurer who may waive it and  
 enforce the contract. In the case of

*Knickerbocker Life Ins. Co. v. Norton*, 96 U.  
 S., 234,

the policy contained this provision:

"If the said premium shall not be paid, etc.,  
 at the time the same shall become due and pay-  
 able, then and in every such case, the company  
 shall not be liable to pay the sum assured, nor  
 any part thereof; and said policy shall *cease* and be  
 null and void without notice to any party or  
 parties interested herein."

It was held that the clause was intended for the benefit of the insurer and that the company was not bound to insist upon the forfeiture but might waive it.

See also the following cases:

*Jones v. Hert*, 192 Ala., 111;

*McMillen v. Strange*, 159 Wisc., 271;

*Meagher v. Hoyle*, 173 Mass., 573;

*Dana v. St. Paul Investment Co.*, 42 Minn., 196.

One of the recent cases construing a contract wherein the purchasers *agreed to buy* subject to the condition that the contract was to be entirely void if payment were not made, is

*Shenner v. Pritchard*, 104 Wisc., 291.

There was a provision in the contract in that case that after a forfeiture had occurred by default in payment, the contract could be revived or renewed by the parties, or by the first party, but it will be seen by an examination of the entire opinion that the case did not turn upon this point alone, but it was a construction of a contract wherein the *purchasers agreed to buy* subject to the condition that if payment were not made "this agreement shall henceforth be utterly void." After default in payment, the sellers sued for the price. It was contended by the purchasers that if they failed to make the payments, the agreement was to be "utterly void

for all purposes," "and no action at law could be maintained thereon," and that

"Thus, it would be left at the option of the vendee in the contract to terminate it at any time he saw fit, by simply failing or refusing to pay any further installments due thereon." Citing a case from 4 Atl., p. 830.

The Court says:

"This decision is opposed to the great weight of authority, as we shall see, and has no support in reason or justice. Suppose, after the contract had been executed, the defendants became dissatisfied with their bargain, and they had refused to make the first payment; could it be claimed that they could then forfeit the contract? The forfeiture clause is that, if they fail to make the payments at the time and the manner specified it shall be void. They agreed to pay a cash payment of \$100.

"What, then, was the meaning of the parties when they entered into this contract? Did they intend it should be a *felo de se*, or that the defendant below might make it so, or valid and operative, at his election? What inducement could the plaintiff below have had for making such a contract? The covenants of the defendant below were absolute, and on his performance the plaintiff below would have been bound; but the clause providing for a forfeiture of previous payments was totally inoperative until at least one payment made. The whole clause providing for the vendor's discharge from his covenants and the forfeiture of the vendees' payments is clearly a condition in favor of the former, not the latter. The vendee was bound to pay at all events. If he



had failed, even after having made payments, the vendor might consider the contract at an end, and sell the land to another. If, however, he chooses not to do so, but holds the vendee to the contract, he has undoubted right to enforce it by compelling payment. A contrary doctrine would be allowing the vendee to take advantage of his own negligence, without any advantage to the vendor, but, rather, an injury, as he is in the meantime prohibited from selling the land to any other purchaser.'

"A review of this case leads to the conclusion that this clause in the contract leaves it for the vendor to say whether he will declare the contract void or not, and that he may elect to sue for the unpaid purchase money or for a specific performance of the contract, or to declare the contract at an end."

The Court sustained the vendor's action for the price, based upon the contract, notwithstanding the provision that in case of default the contract was to be "*utterly void for all purposes*," and that "no action at law could be maintained thereon."

#### THE CONTRACT IN QUESTION WAS FOR CORPORATE STOCK AND NOT FOR A MINE.

The Court in its opinion refers to the contract as one which is usual in mining sections "where the investor takes the chance" upon developing the property. This observation seems to have influenced the construction which the Court placed upon the contract.

It is true that in contracts for the purchase of an

undeveloped mine or mining claim it is not unusual to provide that payments shall be made at various stages of the development work and that the amount of the payments shall be graduated according to the output of the mine. Such contract has direct relation to the actual operation of the mine and is dependent upon the success of the venture. In such cases the purchaser very generally has the right to abandon the contract if the venture proves to be unprofitable.

In the contract with Lange and Hastings, there is nothing to show that any development of property was involved or that the payments were dependent upon any prospective development. There was no "chance to be taken." It was not an option nor a bond on a mine. It was a contract for the *purchase* and *sale* of shares of corporate stock, which does not even indicate in any manner what proportion of the stock it represented in the corporation nor that it had any relation to the control or operation or development of a mine.

It does not appear from the complaint nor the findings nor the evidence what was the capital stock of the corporation, nor whether the 625,000 shares which Lange and Hastings agreed to buy represented a majority or a minority interest. There is nothing to show that the purchase of this stock gave Lange and Hastings a control of the corporation; there was no obligation assumed by them under the contract to do any work upon the property of the Kennedy Consolidated Mining Company, nor were the pay-

ments provided in the contract of Pitt and Campbell in any manner dependent upon the progress of any work or the development of the mine. In fact, there is nothing in the contract to show that the company owned any mine at all. Certainly there could be no difference in the construction of such a contract which otherwise would be an absolute agreement to buy, because it related in terms to a particular kind of corporate stock. *Would there be a difference in the meaning of two contracts exactly alike in all of the terms because one relates to the purchase of land or stock of an industrial corporation and the other to the corporate stock of a mining company?*

*We respectfully urge that the Court erred in classifying this contract as a contract relating to the development of mines where the investor takes the chance of having his hopes rewarded, or his choice of defaulting in payment and losing what he has expended.*

*We think the distinction asserted between this case and Stewart v. Griffith is not sound, that is, if this is not such a mining contract as described, then we think Stewart v. Griffith and the like cases referred to are authority and controlling of the issue.*

The Court cites two cases, namely:

*Ramsey v. West*, 31 Mo. App., 676;

*Williamson v. Hill*, 27 N. E., 1008; 154 Mass.,

Neither of these cases arose in *mining sections* and neither related to mines. *Ramsey v. West*, like *Stewart v. Griffith*, was a contract of sale of real estate. Both of these cases related to the same thing. The forfeiture clause was practically the same in each case and both contracts contained an express covenant to buy. The only trouble with *Ramsey v. West*, decided by an intermediate court of appeal in Missouri, is, that it is in direct conflict with the Supreme Court of the United States in the *Stewart* case.

In *Williamson v. Hill* there *was no agreement to buy at all*. The plaintiff agreed to sell and the contract stated the terms and conditions of the sale, but contained no agreement by the defendant to buy. The forfeiture clause provided that if the payment was not made when demanded the contract was to be void "and the patents shall revert to Williamson."

It is true, as the Court says, "abandonment and forfeiture gave Pitt and Campbell the right to their stock." We have never disputed that right, but the right did not come from the contract but arose from their ownership of the stock. It is true they had the right to take it upon the purchasers' default, but they also had the right not to take it.

While they had the right to take the stock, the exercise of that right was with Pitt and Campbell and not with Lange and Hastings, who were in default, nor with the bank.

The case may be stated in another way. Let the facts be that Lange and Hastings failed to pay the

\$11,250, which they agreed to pay on May 1st. Pitt and Campbell, instead of retaking the stock, sue Lange and Hastings for the amount of this payment. Could they recover? Could Lange and Hastings say, we never agreed to pay if we did not pay. Did the right of Pitt and Campbell cease upon the default, or would it cease only upon the exercise of their right to the stock?

VENDOR COULD NOT ESCAPE OBLIGATION TO CONVEY BY  
FAILING TO CONVEY.

If this contract had provided that in the event of the default of *either* of the parties in performing *any covenant contained therein*, "all rights of each of said parties hereunder shall forever cease and determine," it would probably not be contended, and certainly has not been decided, that upon the full payment of the purchase price, the sellers could relieve themselves from the absolute obligation to convey by failing to convey. It may be, as was said in the opinion, that individuals might have the right to so contract if they saw fit, but the courts will not ordinarily construe such contracts to have intended such results, nor hold that in any case a party to a contract can be relieved of his own obligation by merely failing to perform it, or that he can in any way claim an advantage through his own default. An obligation which may be rescinded by either party at his pleasure is not a contract at all. Of course, where there is no agreement *to buy*, there is no failure to perform.

We will illustrate our contention concerning the construction of this contract in another way. If the payment due on or before May 1st had been delayed, and had not been offered at the bank until May 2nd, Pitt and Campbell would have had the undoubted right to demand the return of the stock and the bank, by the terms of the contract, would have been authorized to deliver it, and if the bank had returned it under such circumstances, the rights of all the parties would "thereupon" have ceased. But if the purchasers had offered payment on the 2nd day of May before the stock had been returned or demanded, it is clear they would have had the privilege of paying, for the rights would not have yet been cut off or have ceased or have been determined by the return of the stock. Certainly the right of Pitt and Campbell, under the contract, to receive the stock would not cease until they got it, for if it did then they would have no right to demand its return. They would have no right to demand it, if their rights had ceased.

*We respectfully urge that the Pitt and Campbell agreement was an absolute agreement, and plaintiffs were bound by their covenant to buy the stock and therefore were not damaged by the delay.*

## FOURTH.

## INTEREST.

The Circuit Court of Appeals modified the judgment below by adding interest from the date of the message. It is said by the Court of Appeal (Tr., p. 218) that

"The liability of the defendant was either in the sum named or for nothing,"

and that

"Since no benefit of any kind accrued to the plaintiffs there was no offset to be allowed."

Assuming this to be true, the fact *was not ascertained* until determined by the Court from the evidence. The plaintiffs alleged that *the stock was of no value*, and therefore that their loss was the amount of the draft. The defendant *denied that the stock was of no value* and alleged that it was of greater value than the balance due upon the contract. The value of the stock was therefore an issue to be determined (Tr., p. 34, Par. VI). If plaintiffs could have sold their stock for \$11,250, which was less than defendant alleged it was worth, they would have suffered no damage. If they had sold the stock for less than that sum, their net loss would have been determined by the price received, that is, by its value. The trial court refused to allow interest because the amount of the *damage could not be ascertained until the trial of the cause on these issues*. It could only

be determined and fixed by the judgment of the Court upon the evidence, and it was therefore not a proper case for the allowance of interest. The facts on which the trial court based this ruling, were as follows:

The plaintiffs had a contract for the purchase of certain shares of stock in a mine for \$75,000 and, contending that they had the right to withdraw from this contract, which we deny, attempted to intercept the payment of a draft which had been forwarded to apply upon the contract. The draft, however, was received by the bank and payment was made. Plaintiffs had the right after this payment was made, if they chose to exercise it, to go on with the purchase of the property and, as we contend, were compelled to do so, but whether they were compelled to make purchase or not, defendant alleged that they were not damaged because the stock was worth more than the price they had agreed to pay therefor. The value of the stock was thus made an issue in the case, and this issue was tried along with the other issues in the cause and finding made thereon (Par. VI of Complaint, Tr., p. 34).

If, as a matter of fact, this mining stock, as alleged, was of an actual value greater than the contract price therefor, and, let us assume, was selling on the stock market for such greater price, could it be said the plaintiffs were damaged by this payment? It matters not whether they were or were not required by law to go on and complete the purchase,



if, as a matter of fact, they had the right to do so and by so doing would have profited by the purchase. In such case they were not damaged by the act of defendant. If, on the other hand, the stock was of no value or was worth less than the purchase price, it must be conceded that plaintiffs would have sustained damage by the payment of the draft unless the amount could be recovered from Pitt and Campbell as having been paid under a mistake. These were matters in controversy and could only be determined by the Court upon the evidence. This evidence is found in the record. The defendant in support of this defense offered the testimony of W. C. Pitt, one of the owners of the mine, and a party to the agreement, and whose evidence supported the special defense (See Tr., p. 155). In rebuttal, plaintiffs offered the evidence of two mining engineers, Ruddock and Bliss, whose expert opinions were given in opposition to the testimony of Pitt (Tr., p. 156). The Court found on this issue in favor of the plaintiffs, that the stock was practically valueless. (Finding XVIII, Tr., p. 60.) Not until this issue was determined could the amount of damages, if any, be *ascertained*, and the demand be considered liquidated.

Counsel, however, invokes the rule that interest will be allowed on unliquidated claims where the amount of the damage can be determined by computation by reference to well established market values. But obviously, such was not the case here. If this stock, in the opinion of plaintiffs, was worth \$75,000

in March and, as found by the Court, was practically valueless in April, it cannot well be contended that the damages could have been ascertained by reference to well established market values. The rule which counsel invokes refers to securities or commodities which have standard values, by the use of which damages can be ascertained and mathematically determined by simple computation.

If the Court had found for the defendant on this issue of value of the stock, and had ascertained that the plaintiffs, after the payment they attempted to intercept had been made, could have sold the stock for \$75,000 and thus reimburse themselves, then it follows that although all other issues may have been found for plaintiffs, they would have sustained no damage.

This issue of value was determined against us upon a conflict of evidence and we are concluded thereby, but the amount of the damages could not be *ascertained* until the issue had been determined by the Court.

These are the reasons the District Court declined to allow interest upon this claim.

## SUMMARIZING.

We respectfully contend:

1st. The message was sent subject to the terms and conditions of a written contract agreed to by the parties and which is valid.

2nd. The alleged *oral contract of insurance* was in conflict with the *written agreement* under which the message was sent.

3rd. The contract between Lange and Hastings and Pitt and Campbell was not an option but was an absolute agreement to buy the stock, and the forfeiture clause at the end of the agreement was intended only to provide an additional remedy for the benefit of the vendors.

4th. The provision in the contract that "there-upon" the rights of the parties should cease and determine, relates not to the default of purchasers, but to the *return of the stock which the evidence does not show was ever returned.*

5th. That if the contract could be construed to be an option, it was a continuing option or offer to sell, which was accepted when the plaintiffs mailed the bank draft prior to the filing of the telegram, with the instructions to apply it on the agreement.

6th. The judgment should not be for more than the amount received for sending the message, nor in

any case beyond fifty times the sum received for sending the same.

Respectfully submitted.

RUSH TAGGART,  
FRANCIS R. STARK,  
BEVERLY L. HODGHEAD,  
Counsel for Petitioner.





No. 159

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1919.

THE WESTERN UNION TELE-  
GRAPH COMPANY, a corpora-  
tion,

Petitioner,

VS.

GEORGE M. BROWN, Executor  
of the Last Will and Testa-  
ment of WILLIAM LANGE, JR.,  
Deceased, and J. U. HAST-  
INGS,

Respondents.

**REPLY BRIEF OF PETITIONER,  
THE WESTERN UNION TELE-  
GRAPH COMPANY.**

We ask the permission of the court to make a  
short reply to respondents' brief.

**I.**

**The Scope of the Inquiry.**

Respondents' claim that the Circuit Court of  
Appeals was precluded from entering upon any  
inquiry into the sufficiency of the evidence to sup-

port the findings or a judgment in this case on the ground, it is stated, that at the close of the evidence no request was made for a judgment, citing the case of *Pennsylvania Casualty Co. v. White-way*, 210 Fed. 782, and other cases, at page 12 of their brief. The authorities cited by counsel, however, related to the cases of general findings. In this case, which was tried by the court without a jury, special findings of fact were requested and made. This same objection, urged in the Circuit Court of Appeals, did not deter that court from giving consideration to the evidence in the cause. While it is the contention of the petitioner here that in several very material particulars the findings are not supported by the evidence, yet the chief basis of the appeal is that even under the special facts found by the court and admitted by the parties, the defendant below was entitled to judgment in its favor.

## II.

### **The effect of the stipulations upon the message blank relating to the conditions under which messages are transmitted.**

Since the brief of petitioner herein was filed, this court, on December 8, 1919, decided the case of *Postal Telegraph Co. v. Warren-Godwin Lumber Co.*, No. 91 of the present term, wherein the terms of a message contract similar to the one herein involved were considered. By that decision the court has disposed of many of the contentions of the respondents herein, whose brief was written before the decision was available. Counsel for respondents has reviewed the early decisions of many



of the courts which hold the provision of the message contract relating to unrepeatd messages to be invalid and especially where the loss arose from delay rather than error in transmission. The point of the argument seems to be that the courts will determine the validity of these stipulations by ascertaining in each case whether such repetition of the message would have tended to avoid the loss. This court, in the Warren-Godwin case above referred to, reaffirmed its decision in the Primrose case, 154 U. S. 1, and has based its decision upon entirely different grounds, holding that the "condition" is one "appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance."

While this case before the court arose prior to the Act of Congress of June 18, 1910, by which it is held it was intended by Congress to assume control of the rates and rules and regulations of telegraph companies, it does not follow that this provision of the message contract was invalid prior to that date. The Act of Congress did not make valid a provision of a contract which theretofore was void. The effect of the Act of 1910, as construed by this court and the Interstate Commerce Commission and the other courts which have upheld it, is to make certain the fact that this stipulation of the message contract relating to the transmission of unrepeatd messages, about which there has been so much controversy in the courts, is valid. It was so determined by this court in the Primrose case decided prior to the Act of Congress, and as said by the Interstate Commerce Commission in *Clay County Produce Co. v. Western Union Telegraph Co.*, 44 Int. Com. Rep. 670, approved by this court in the Warren-Godwin case, above cited:

"From the very inception of the telegraph business or at least for a period of forty years before 1910, the unrepeatd message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest."

If, as held by this court in the Primrose case and the Warren-Godwin Lumber case, the provision of the message contract under consideration is a reasonable one adjusting the charge to the measure of the duty and responsibility, it applies alike to delay as to error in transmission, and we deem it unnecessary to enter upon a discussion of the various classes of telegraph messages and the conditions under which the stipulation would be valid, or attempt to review the manifold theories which counsel has advanced regarding the application of the stipulation to the different class of cases. We reassert here, however, that it appears from the record and the finding of the court that the message in question failed in transmission somewhere between Reno and Wabuska in the State of Nevada, which was an *intermediate point* in the course of the transmission. While under the true construction of this stipulation which we understand has been put upon it by this court it is not necessary to inquire whether the particular loss might have been avoided by the repetition of the message, it is apparent that the failure of the sending operator to have received the returned message would have been direct notice that it had miscarried. If the stipulations in question are now reasonable and valid conditions under the present Act of Congress which expressly approve the classification of messages which it had long been the custom of telegraph companies to make, the same conditions and stipulations were reasonable and valid at the time

the message in suit was sent. The diversity of judicial opinion with respect to these stipulations is pointed to by the Interstate Commerce Commission in the case above referred to of *Clay Co. Produce Co. v. Western Union Telegraph Co.*, and it is there stated that it is necessary to establish a fixed rule so that the transmitting of an interstate message may no longer involve a greater or less liability in one form than it does in another. In view of the decision of this court in the *Primrose* case, which established the same rule the courts have applied to the stipulation since the Act of Congress of 1910, the decisions of the various courts holding that the stipulation is inapplicable in certain cases may no longer be cited as authority. The plaintiffs in the action, therefore, were not entitled to recover more than the amount designated in the stipulation, provided the message was sent subject to its written contract designating the conditions under which the message was to be transmitted and the measure of damage in case of loss. The plaintiff below testified that he did not order the message to be repeated.

### III.

#### **The alleged oral contract of insurance.**

The record shows that the message was transmitted under the written agreement. The original message, marked "Plaintiff's Exhibit 3," was introduced in evidence by plaintiffs in the course of the trial. It reads (Trs. p. 83) :

"Send the following message subject to the terms on the back hereof which are hereby agreed to."

Then follows the message, signed by plaintiffs herein, and the terms and conditions upon which it was received by the company. Then the following proceeding occurred:

"Mr. Hodghead (for defendant): I understand that if this message which is a contract and message combined, is offered, it is the entire contract which is introduced, including the stipulations upon the message blank.

"Mr. Poorman (for plaintiffs) Yes, if they have any bearing on it" (Tr. p. 85).

It having been thus established that the message was sent subject to these written terms, which were agreed to, it was not competent for the court to find that any other oral contract defining a different liability or measure of damage was made. Respondents contend that the finding of the oral contract is conclusive upon the record here, which as stated at the outset is not true in view of the request for special findings; but if it were, the finding of the existence of an oral contract would be immaterial in view of the written agreement. If it were permissible here for the plaintiffs, notwithstanding their written contract, to show that the message was transmitted under an oral contract different in terms, then the message blanks upon which the multitude of messages are transmitted from day to day, which define the terms and conditions of transmission, may be superseded by any oral contract which the parties in interest might be able to establish over the evidence of the agent of the telegraph company, as was done in this case.

Respondents seem to feel that after they had stated to the agent of the company the purpose of their message the telegraph company thereafter in

some way became responsible for any loss arising from its non-delivery. It is urged that they put their whole case in the defendant's hands and that some exception should be made in this particular case and a different rule of law prevail. Nothing is more common than for users of the telegraph to make inquiry of receiving clerks or agents about the classes of messages and the safest method of transmission and to advise them of the urgency of the message. But aside from the notice of the business, the liability of the telegraph company, under its contract, is no greater in cases like the present one than in any other case. The telegraph company does not become an insurer of a message because the plaintiffs, as they state in this case, placed themselves in the defendant's hands. A uniform liability must prevail with respect to all messages of the same class, and the measure of that liability is found in the written terms of the contract.

#### IV.

##### **Gross Negligence.**

The finding of the court and respondents' argument that the negligence was gross were based upon the conclusion that the defendant wilfully delayed the delivery for the period of three days, which caused the alleged loss. In counsel's argument, found at page 80, defendant even seems to be charged with delay because the message was not delivered at night, although the receiving office did not open until seven o'clock on the following morning. The plaintiffs' notice to the agent was that the draft would be paid unless the message were delivered before banking hours the next morning. The

draft was actually received between 8:30 and 9:00 o'clock A. M. As the telephone office did not open until 7:00, the message could hardly ordinarily have been delivered before 7:30 A. M., and the delay therefore so far as the alleged loss was concerned, was from one to two hours. This is not gross negligence and was not found by the court to be gross negligence. But the court found that the delay of three days was gross negligence, which, however, had nothing to do with the loss, as the delay after the draft was received and paid was immaterial.

## V.

**Was the contract of plaintiffs with Pitt and Campbell for the purchase of the shares of stock an option only or was it an absolute agreement to buy the stock and pay the price agreed upon?**

Among the authorities cited by the respondents, one only seems to have any application: that is the case of *Ramsey v. West*, decided by an intermediate court of appeal in Missouri. And yet the forfeiture clause of the contract under consideration in that case differed in a very material respect from the Lange and Hastings contract involved here, because in that case the parties were to be released upon default in payment, whereas we contend that no such interpretation can be put upon the Lange and Hastings contract, which seems clearly to provide, especially in view of the positive agreement to buy which is not found in option contracts, that the rights of the parties were to cease and determine, not when the purchasers made default, but when, after default, the sellers, abandon-

ing their right to enforce payment, retook the stock. That, we say, is the clear meaning of the words of the contract: "and *thereupon* all rights of each of the said parties shall forever cease and determine." The stock could not be returned "automatically" as counsel say. Pitt and Campbell had the right to demand its return because that right was given them by the law and the contract.

The quotation in counsel's brief from the case of *Beckwith-Anderson v. Allison*, 26 Cal. 473, is misleading. The court, by looking at page 474, where the terms of the contract are stated, will see that Davidson, the purchaser, never in any manner agreed to buy the property, and that none of the parties even contended that this contract with Davidson was anything more than an option.

In *Verestein v. Ycaney*, 210 Pa. 109, the court says (see p. 21 of counsel's brief) that under the terms of the agreement "they (the purchasers) are to be released from liability." As to the cases of:

*Gordon v. Swan*, 43 Cal. 564, and  
*Williamson v. Hill*, 154 Mass. 117,

as stated in our former brief, page 36, there was no agreement to buy made by the purchasers, but the contract in each case was clearly one of option.

### **The Cases Contra.**

On the other hand, the Supreme Court of the United States in the case of

*Stewart v. Griffith*, 217 U. S. 223,

in considering the effect of a forfeiture clause providing that upon non-payment the contract was to

be null and void and of no effect in law, gave controlling effect to the question whether the contract contained a clause *by which the purchasers had agreed to buy and pay the price named*, and held that where the contract so provided, instead of containing merely an agreement to sell upon the conditions specified, the agreement was absolute and payment could be enforced.

The supreme court of Pennsylvania took the same view in the case of

*Weaver v. Griffith*, 210 Pa. 13 (see former brief, p. 32).

We agree that the correct rule is stated in  
2 *Warvelle Vendors*, p. 818,

where it is said:

"The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end."

But the fact is, the plaintiff in error in this case is not dependent upon the law of those cases, which do, however, state the prevailing rule, because, as above stated, the contract with Pitt and Campbell provided that the rights of the parties were not to cease upon default in payment, but upon return of the stock.

Counsel at the oral argument contended that the nature of the property which was the subject matter of the contract should be considered, from which they claimed it would appear the purchasers never contemplated that they were entering into



an agreement to buy. But if this were true, it was inadvisable to insert in the contract the absolute agreement to buy in the form in which it was stated.

Counsel further contend that the finding No. XVII, that Lange and Hastings abandoned the contract and forfeited the previous payment, was in effect a finding that Pitt and Campbell had taken back the stock. But this is not so. If we assume that the contract was an absolute agreement to buy and that the purchasers broke the contract and failed to make the payments, it would follow in any event that previous payments would be lost or forfeited. There would certainly be no way by which they could be recovered. Counsel cites from apt authority to show this in the case of

*Glock v. Howard*, 123 Cal. 1 :

"The law itself works the forfeiture of the money already paid on a contract such as that now under discussion even in the absence of the express provision therefor."

But if as stated we assume for the purpose of the argument that the contract is absolute, the finding that Lange and Hastings had abandoned it would not be a finding that Pitt and Campbell had abandoned it or surrendered their right to enforce a payment. There is nothing in the record to show that Pitt and Campbell ever asserted a claim or ever permitted the statute of limitations to run, or had or had not taken any action to enforce payment, or that they had received the stock. There is no finding nor evidence nor allegation that Pitt and Campbell ever surrendered their right to enforce the contract.

But if Pitt and Campbell had elected to retake

the stock, which is not shown, affirmatively or by inference, it could have made no difference in the case. The liability of the telegraph company was fixed or not at the time of the payment complained of on April 30th. The stock could not be returned until July 2nd, because there was no default in payment until that date. The claim on which this action was founded was made June 26, 1907, before there was any default, and before the stock could have been returned (Tr. p. 11, par. IX). The liability of the telegraph company cannot be made to depend upon the election of Pitt and Campbell at a subsequent time to accept the stock when under the terms of the contract they were not required to accept it. So the controversy reverts to the original question: Were Pitt and Campbell given the right by the terms of the contract to enforce the payment provided for therein?

## VI.

**The contract in question was not for a purchase of a mine but of corporate stock.**

Respondents urge that in construing the Pitt and Campbell contract a different rule of construction prevails with relation to contracts for the purchase of mining property from that in contracts for the purchase of property of a different kind. But counsel has not met the fact that the Pitt and Campbell contract for the purchase of shares of stock and only that. There is nothing to show that the purchase of this stock gave plaintiffs the control of the corporation or the possession of any mine, or that the contract was contingent in any

way upon the success of a mining venture. Upon this point we repeat the argument found at pages 81-3 of our former brief.

## **VII.**

### **Interest on the Claim.**

Upon this point the respondent's have cited a number of authorities, but counsel has been frank to admit (p. 21) that none of them are precisely in point. This seems to be a sufficient reason why they need not be reviewed here. It may well be said that after the trial of the case the amount of plaintiffs' loss (assuming that there was a loss) was determined. But whether the amount of the draft represented the amount of the loss could not be ascertained until the trial and the findings of the court were made upon certain issues in the case. This is the reason the trial court refused the plaintiffs' claim for interest. Upon this point we have little to add to the argument stated at pages 87-90 of our opening brief. By the delay in the message the plaintiffs did not lose the opportunity to make a payment, but on the contrary the payment was made which they were trying to prevent, and their rights under the contract were thereby preserved. If, therefore, the shares of stock involved in the contract had been actually sold after this payment was made or were of a value in amount equal to or greater than the purchase price named in the contract, as plaintiffs undoubtedly supposed them to be, then there could not possibly have been any loss. This was a defense in the case and the court made a finding. The amount, therefore, of plaintiffs' loss could not be

ascertained until the trial of the case, and no interest should have been allowed.

RUSH TAGGART,  
FRANCIS R. STARK,  
195 Broadway, New York, N. Y.

BEVERLY L. HODGHEAD,  
58 Sutter St., San Francisco, Cal.  
Counsel for Petitioner.

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# SUPREME COURT

OF THE  
UNITED STATES

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No. 159.

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October Term, 1919.

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The Western Union Telegraph Com-  
pany, a Corporation.

*Plaintiff,*

vs.

George M. Brown, Receiver of the  
East Will and Testament of Wil-  
liam George B. Brown, and J. D.  
Hawkins.

*Respondents.*

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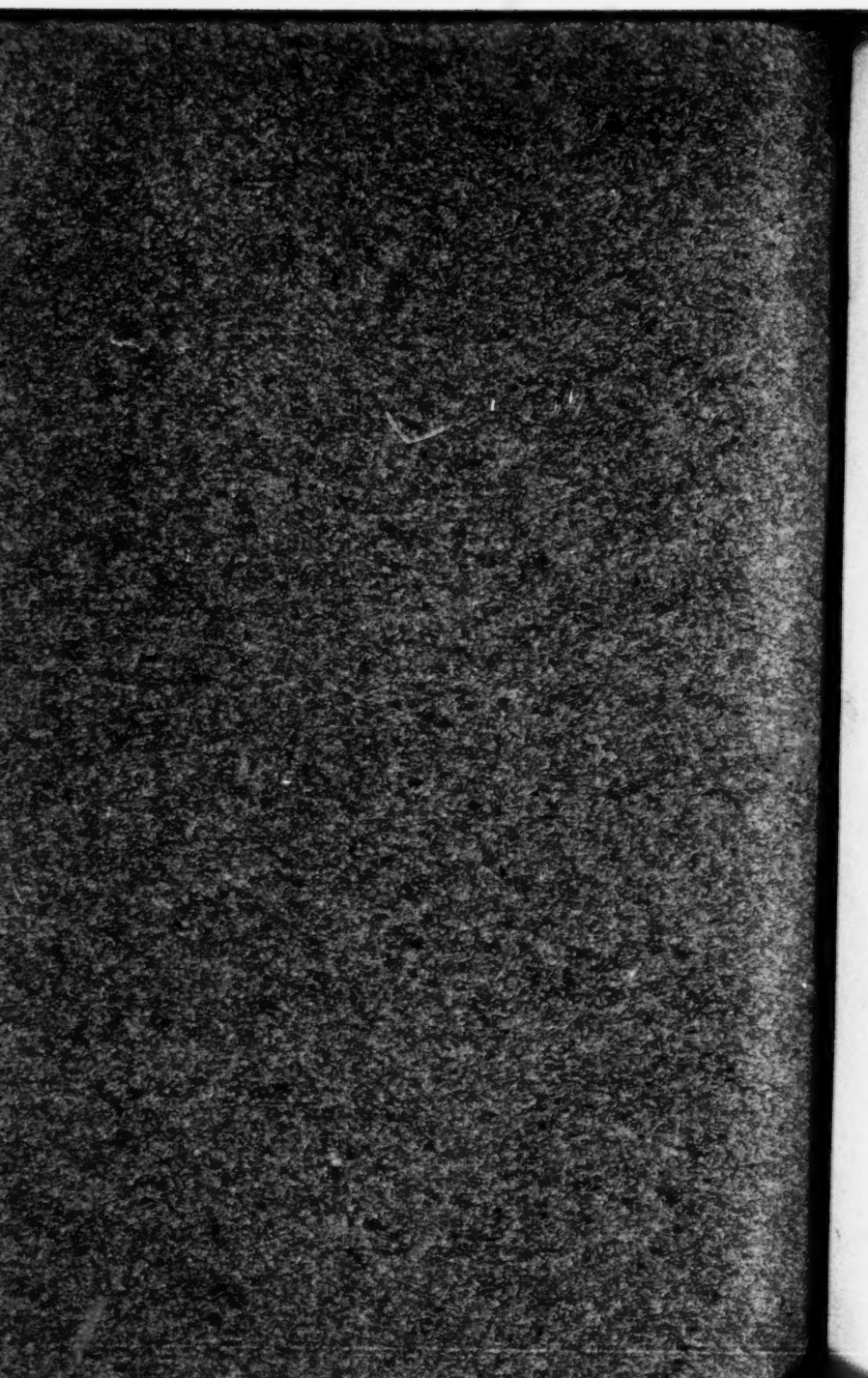
FILED ON BEHALF OF RESPONDENTS.

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SAMUEL POORMAN, JR.

*Counsel for Respondents.*

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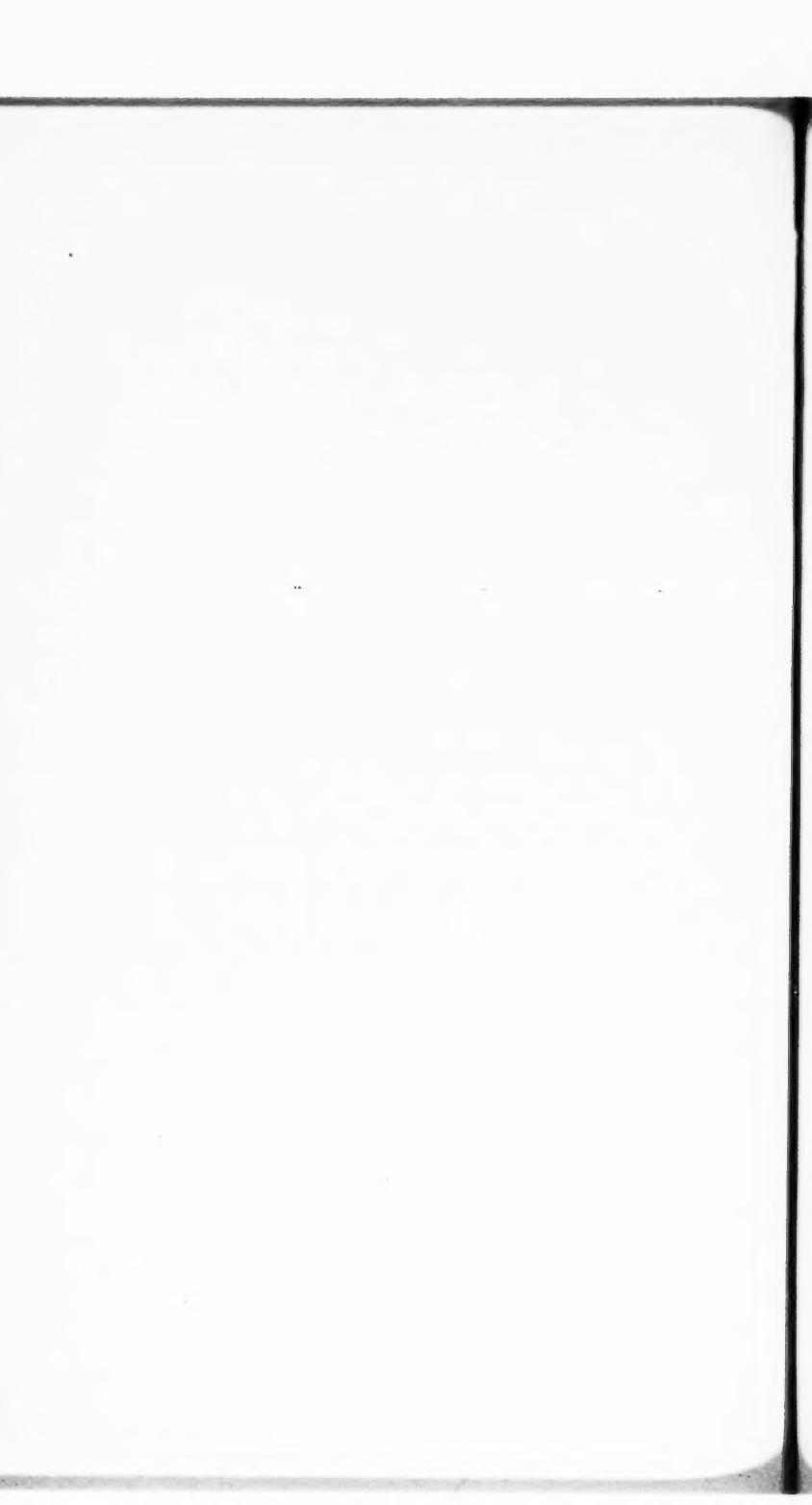
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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES.**

---

No. 159.

October Term, 1919.

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The Western Union Telegraph Com-  
pany, a Corporation,

*Petitioner,*

*vs.*

George M. Brown, Executor of the  
Last Will and Testament of Wil-  
liam Lange Jr., Deceased, and J. U.  
Hastings,

*Respondents.*

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**BRIEF ON BEHALF OF RESPONDENTS.**

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**PRELIMINARY STATEMENT.**

This cause is before the court on *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit.

Plaintiffs below\* brought this action against defendant Telegraph Company (the petitioner

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\*—For convenience, the parties are herein referred to by their respective original designations. (All italics are our own.)

herein) to recover \$11,250.00, with interest, as damages for delay in the transmission and delivery of a telegram. After judgment by the United States District Court in favor of plaintiffs for the principal of their demand, plaintiffs and defendant, respectively, sued writs of error out of the Circuit Court of Appeals for the Ninth Circuit. The latter court directed that said judgment be modified so as to include the interest prayed for, and that as so modified it be affirmed. (*Western Union Telegraph Company v. Lange*, 248 Fed. 656, 664.) Thereupon, upon defendant's petition for a writ of *certiorari*, the cause was brought before this court.

With great deference to counsel for defendant, we are impelled, by a divergence of view—natural as between opposing advocates—respecting the salient features of the case, to restate the facts as they appear from plaintiffs' standpoint.

### STATEMENT OF THE CASE.

The action was brought to recover a loss suffered through defendant's *delay*, for three days, in the transmission and delivery of a telegram sent by plaintiffs from Oakland, California, to Lyon County Bank at Yerington, Nevada. This telegram was sent under a *special contract* by which defendant, *for an extra*

*toll*, INSURED its immediate transmission and delivery. [Findings X, XII, Tr., pp. 52-53, 56.] By it plaintiff sought to intercept and prevent the payment of a draft in the sum of \$11,250 which had been previously mailed by them to said bank, for the purpose of meeting the second of seven installment payments under a contract, then in force between themselves and Messrs. Pitt and Campbell, for the purchase by plaintiffs of certain mining stock. [Findings VII-VIII, Tr., pp. 47-52.] That contract provided for an initial payment, which was made upon the execution thereof, and for the deposit in escrow with said bank of the stock in question under escrow instructions therein stipulated for. [Finding IV, Tr., pp. 43-46.] The deposit was accordingly made and the stock was thereafter held by the bank "in accordance with said contract and subject to such disposition as was required by said contract on the happening of any of the contingencies therein provided for." [Finding V, Tr., pp. 46-47.] The contract provided for deferred installment payments at sixty-day intervals on account of the purchase price of said stock—the first of which was to be made on or before May 1st, 1907—and further provided (as plaintiffs contend) that default in any payment should *automatically* effect the return of the stock by the bank to Pitt and Campbell, the

forfeiture of all moneys previously paid by plaintiffs, and the termination "of *all rights* of EACH of the parties" thereunder. [See clause "Third" thereof, Tr., pp. 45-46.]

The contract required payments to be made at the bank *in gold coin*,—the bank being thereby constituted the agent of Pitt and Campbell "for the purpose of receiving any and all payments to be made "*hereunder*." [Tr., p. 45.] Immediately after the execution of the contract, plaintiffs arranged with the bank that it should pay *in gold coin*, to Pitt and Campbell pursuant to the terms of the contract, the amount of any drafts they might send it. [Finding VI, Tr., p. 47.]

On April 27th, 1907, plaintiffs sent from Oakland, California, by registered mail, to the bank at Yerington, Nevada, a draft on San Francisco in the sum of \$11,250, payable to the bank. This draft was sent for the purpose of meeting the May 1st payment under the Pitt and Campbell contract, and was received by the bank in due course of mail on April 30th, between 8:30 and 9 o'clock a. m. [Finding VII, Tr., pp. 47-48.] Thereafter on that day, the bank, pursuant to its arrangement with plaintiffs, paid over the amount thereof *in gold coin* to Pitt and Campbell, and later collected the amount of the draft from the drawee thereof. [Finding XVI, Tr., p. 59.]



On the afternoon of April 29th, the day before the amount of the draft was paid by the bank to Pitt and Campbell, plaintiffs were advised by the engineers who had examined the mine at their instance, that the property was valueless, and they thereupon determined to abandon the Pitt and Campbell contract and to notify the bank not to advance or pay any sum on the draft already sent. To that end, on that same evening they offered to defendants at Oakland, for immediate telegraphic transmission and delivery to the bank at Yerington, the following message: "Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows."

At the time they stated to defendant's agent "that it was *absolutely necessary* that said message be delivered to said bank \* \* \* *before banking hours* on the following morning \* \* \* and desired to know of said agent *in what manner* the said plaintiffs could be *absolutely assured* that said message would be so delivered." They explained the whole situation with regard to the subject matter of the message, including the extreme need for promptness, the terms of the Pitt and Campbell contract, and the amount of the loss that would be incurred if the message failed of such prompt delivery. They further disclosed to defendant's agent the facts

regarding the mailing of the draft, the time at which it would be delivered to the bank in due course of mail, and their information that the stock was valueless. They advised him that they had determined to make no further payments, and that the purpose of the message was to intercept payment by the bank of the amount of the draft as hereinbefore mentioned. Plaintiffs also stated that unless the telegram was transmitted and delivered before banking hours of the following morning, the bank would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event said amount would be wholly lost to themselves, since they purposed not to proceed under the contract.

Plaintiffs placed themselves wholly in defendant's hands as regards the steps to be taken in employing the latter's instrumentalities for their purpose, stating to its operator that they *desired to be advised* how the immediate transmission and delivery of their message might be *insured or guaranteed*. The operator represented to plaintiffs that defendant would INSURE the immediate delivery of said message if plaintiffs would pay defendant the sum of \$1.45, which was *in excess* of defendant's *ordinary* tolls. Thereupon, plaintiffs accepted this proposal, delivered the message in writing to defendant, and paid it the sum mentioned. The

operator received such payment, wrote upon the message the words, "Deliver immediately," and simultaneously accepted said message on the terms indicated, and INSURED to plaintiffs such immediate transmission and delivery. [Finding VIII, Tr., pp. 48-52.]

Defendant did not, at the time, inform plaintiffs that its lines extended only to Wabuska, or that beyond that point the message would have to be transmitted over a connecting telephone line. [Finding IX, Tr., p. 52.]

The court found that the charge paid by plaintiffs "was so paid and was by defendant accepted in consideration of the agreement and undertaking by defendant immediately to transmit and immediately to deliver said message in *such manner* and under *such classification* as, *pursuant to the rules and regulations of defendant*, was required in order that defendant would *insure* to plaintiffs such immediate transmission and immediate delivery thereof to said Lyon County Bank." [Finding X, Tr., p. 53.] Nevertheless, said message was not repeated by defendant in the manner provided in the stipulations on the message blank. [Finding XII, Tr., p. 56.]

Defendant did not promptly transmit said message to Wabuska, its terminus, on the evening of April 29th, nor did it promptly deliver the same to the Yerington Electric Company

(which operated the connecting telephone line), for further transmission by telephone to Yerington, but, on the contrary, wholly failed to transmit said messages to Wabuska or to deliver it to Yerington Electric Company until May 2nd. This delay occurred wholly on the lines of the telegraph of defendant. [Finding XV, Tr., p. 58.]

If defendant had, with reasonable promptness, transmitted and delivered said message to the bank, the same would have reached the bank before it had received the draft; and if the bank had received the message before receiving the draft, it would not have advanced or paid any amount thereon. However, the bank, as above stated, received the draft between 8:30 and 9 o'clock a. m. on April 30th, and thereafter on that day paid the amount thereof *in gold coin* to Pitt and Campbell, without any knowledge of plaintiffs' desire to withhold payment. [Finding XVI, Tr., pp. 59-60.] Plaintiffs did not make any further payment on the contract, but abandoned the same and forfeited all moneys paid thereon. [Finding XVII, Tr., p. 60.]

On April 29th, 1907, and at all times thereafter, said mining stock was practically valueless. [Finding XVIII, Tr., p. 60.] By reason of what the court found to be "defendant's *gross negligence*" in delaying the transmission

and delivery of said message until May 2nd [Finding XVI, Tr., p. 59], plaintiffs suffered a loss in the amount of the draft [Finding XX, Tr., p. 61]; and, after making written claim therefor within sixty days, as required by the stipulation on the message blank [Finding XIX, Tr., pp. 60-61, brought this action to recover the same.

From Wabuska to Yerington, a distance of eleven miles [Finding XIV, Tr., p. 58], the only means for the electrical transmission of messages was the telephone line of the Yerington Electric Company. This company and defendant had an arrangement for the interchange of business, each charging its own tolls on a message sent over both lines. Each company employed the railroad agent at Wabuska to handle its business and each maintained its office there in the railway station, the telegraph and telephone instruments being within a few feet of each other. [Finding XIII, Tr., pp. 56-58.]

### **The Scope of the Inquiry Herein.**

At the close of the evidence, defendant made no request "for a ruling thereon," no "motion for judgment," nor any "motion to present to the court the issue of law so involved." (*Pennsylvania Casualty Co. v. Whiteaway*, 210 Fed. 782, 784.) Therefore, under sections 649, 700

and 1011 of the Revised Statutes of the United States, the Circuit Court of Appeals was precluded herein from entering upon any inquiry into the sufficiency of the evidence to support the special findings or the judgment. See, on this head,

*Mercantile Trust Co. v. Wood*, 60 Fed. 346, 348;

*Citizens Bank v. Farwell*, 63 Fed 117;

*Wear v. Imperial Window Glass Co.*, 224 Fed. 60, 62, 63;

*Maryland, etc. Co. v. Orchard Land & Timber Co.*, 240 Fed. 364.

However, counsel would seem to seek to have this court review the evidence herein to determine whether it was sufficient to sustain the finding that the delay complained of was the result of defendant's *gross negligence*, and also the finding that defendant entered into a *special contract*, distinct from the stipulations on the message blank, whereby it insured to plaintiffs the immediate transmission and delivery of their telegram. But clearly, the present inquiry is confined to the question of law whether the findings support the judgment. By section 1011 of the Revised Statutes, it is provided that "there shall be no reversal in the Supreme Court \* \* \* upon a writ of error, \* \* \* for any error in fact;" and by section

240 of the Judicial Code, in any case before it on *certiorari*, this court's power and authority is the same "as if it [the case] had been carried by appeal or writ of error to the Supreme Court."

### The Points Made by Petitioner Herein.

Petitioner contends:

First. That the trial court erred in finding that the message was transmitted under an *oral* contract of insurance against loss or damage from *delay* in transmission or delivery, for the reason that the message was written upon one of defendant's message blanks containing a stipulation providing that "*correctness* in the transmission \* \* \* can be insured by contract in *writing*." [Petitioner's brief, pp. 25-32.]

Second. That the written stipulations upon the message blank limiting the liability of defendant for defaults with respect to *unrepeated* messages to the amount received for sending the same, and with respect to *repeated* messages to fifty times that amount, are valid and conclusive of the rights of plaintiffs. [Petitioner's brief, pp. 33-56.]

Third. That the trial court erred in finding that defendant was guilty of *gross negligence* in the transmission and delivery of the message. [Petitioner's brief, pp. 56-61.]

Fourth. That plaintiffs suffered no damage by the delay of their message, for the reason that their contract with Messrs. Pitt and Campbell was an *absolute* contract to purchase,—and not a mere *option* to purchase,—the shares of stock constituting the subject-matter thereof. [Petitioner's brief, pp. 62-86.]

Fifth: That plaintiffs were not entitled to *interest* upon the principal amount of their demand herein, for the reason that, until judgment, said demand was unliquidated. [Petitioner's brief, pp. 87-90.]

## BRIEF OF THE ARGUMENT ON BEHALF OF RESPONDENTS.

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### Points of Law and Fact.

In answer to defendant's attack upon the judgment herein, plaintiffs maintain,—

(a) That the *stipulations* on the message blank do *not* operate to relieve the company from liability for its negligence; and then, assuming that this proposition be established, *either*

(b) That under the forfeiture clause of the Pitt and Campbell contract, plaintiffs had the *option* to withhold the May 1st installment and thereby *forfeit* the previous payment and terminate "*all rights of each of the parties*" thereunder; or, failing such option in plaintiffs,



(c) That the fact as found is that Pitt and Campbell *exercised the option*, which defendant contends *they alone had* under such forfeiture clause, by electing to *take back their stock* and to terminate the contract.

As an incident to plaintiffs' right to recover the principal of their demand, they further maintain,—

(d) That said demand was of such a character as to entitle them to *interest* thereon, and that the judgment was properly modified to include the same.

Accordingly, the following points are made in this brief on behalf of plaintiffs, to-wit:

I. The finding that the special contract of insurance was the one actually entered into, is conclusive; but in any event, as plaintiffs, in ignorance of the terms of the message blank, put their whole case in defendant's hands and abided by its directions respecting the manner in which the message should be sent to conform to its rules, defendant cannot escape liability if, in following such directions, plaintiffs omitted some formality required by the printed stipulations.

II. The stipulations on the message blank do not, as properly construed, relieve defendant from liability for its negligent delay herein, even if no *gross negligence* were imputed to it by the trial court's findings.

(a) The stipulation prescribing the mode in which the special insurance of messages may be effected, does not require a contract *in writing* except where the insurance is against *errors in transmission*, and, accordingly, there is no inhibition upon the *verbal* insurance against *delays* by the court found to have been effected.

(b) Even if,—contrary to the facts as found,—the message had not been sent under a special contract of insurance for an extra toll, the stipulation of non-liability for unrepeatd messages could not operate to exonerate defendant, for compliance with its terms would have *no tendency to prevent delays* arising from *general* causes, but would conduce only to the *correction of errors* in transmission and, therefore, only to the avoidance of *delays chargeable to such errors*. Here, the message was, in all respects, correctly transmitted, the delay being due to its total disappearance for three days while in transit.

(c) The stipulation of non-liability for messages forwarded over connecting lines is not in conflict with the special contract of insurance and has no application to the case at bar, (1) because it contemplates exemption only for defaults chargeable to the connecting line, and not, as here, for a delay occurring *wholly upon the defendant's own lines*; (2) because it has reference only to connecting *telegraph*—as dis-

tinguished from *telephone*—lines; (3) because it comprehends only those *casual* instances in which defendant finds it necessary to forward over a connecting line,—not to the case of a *standing agreement* for the forwarding over a certain line of *all* messages for a given destination; and (4) because it does not inhibit the making of a *special agreement* to deliver beyond defendant's terminus.

III. The finding that the delay complained of was the result of defendant's *gross negligence*, is conclusive; and no stipulation can exempt it from liability for the consequences thereof.

IV. The Pitt and Campbell contract left it to plaintiffs' *option* to withhold the May 1st installment and thereby forfeit the previous payment and terminate "*all rights of each of the parties*" thereunder.

V. Apart from the question of the *construction* of the Pitt and Campbell contract, the court's finding that plaintiffs made *no further payments* thereunder but abandoned the same and *forfeited all moneys paid thereon*, constitutes a finding that Pitt and Campbell exercised *their* right of election (if any),—not by enforcing the contract,—but *by declaring a forfeiture and taking back their stock*.

VI. The judgment herein, as modified, properly includes interest from the date of plaintiffs'

claim of loss, (a) because the damages claimed, namely, the amount of the draft, constituted a *liquidated demand*; and (b) because even if the demand herein were unliquidated, defendant's repudiation of *all* liability would render inapplicable the general rule denying interest thereon.

I.

**The Finding That the Special Contract of Insurance Was the One Actually Entered Into, Is Conclusive; but in Any Event, as Plaintiffs, in Ignorance of the Terms of the Message Blank, Put Their Whole Case in Defendant's Hands and Abided by Its Directions Respecting the Manner in Which the Message Should Be Sent to Conform to Its Rules, Defendant Cannot Escape Liability If, in Following Such Directions, Plaintiffs Omitted Some Formality Required by the Printed Stipulations.**

Under the facts found, counsel's argument on the points based on the stipulations on the telegraph blank, is, for the most part, entirely beside the mark. It is not to be lost sight of that plaintiffs went to the telegraph office; explained to defendant's agent in charge just what their difficulty was and what they desired to do; and, after putting the case fully before

him, asked what steps they would have to take "in order to INSURE the immediate delivery" of their message to the addressee. They put themselves wholly on defendant's hands; complied exactly with the instructions given them by the agent; paid all charges (*including an EXTRA fee*) asked of them; and saw defendant's agent write the words "deliver immediately" on the message,—by which words was evidence precisely what they had agreed and paid *extra* for. [Finding VIII, Tr., pp. 48-52.] It hardly lies in defendant's mouth under these circumstances, not only to assert that the stipulations should be warped from their natural meaning to cover this case (a thing that we shall show to be necessary to make them at all applicable thereto), but, supposing them to be strictly applicable, to invoke them in order to take advantage of the ignorance, incompetence, negligence, or wilful misrepresentation and extortion of its agent.

A telegraph company can do business with the public only through its agents, and on them the public must absolutely rely for information as to the manner in which such business shall be transacted. When the sender of a message states to such an agent just what he wishes to accomplish through the company's public facilities; and, putting himself wholly in the company's hands, asks what steps he must take to effect what he wishes, making no condition

or restriction whatever as to cost or charge; and then, being advised in this regard, does *exactly* as he is told and in the *precise mode* pointed out to him,—he should, in strict justice, be permitted to rely on the contract thus made even when its formalities do not come within the strict letter of the company's regulations. By the company's act, he is put off his guard and contracts in full confidence that the forms adopted answer to the company's rules. The *onus* of seeing to the observance thereof is in such case shifted to, and accepted by, the company, and its failure in a matter as to which it has special knowledge of the highest character, should be borne by it and not by the sender.

The essence of the employment of the telegraph, as a means of communication, is speed; and to require the sender to go through the company's regulations to check up and determine the correctness of the representations of the company's agent as to the mode of employing the principal in any particular instance (especially when a free hand, so to speak, is given the agent by the sender), would be unreasonable in that it would defeat the very purpose of that employment. And when all this had been done by the sender, he would still have to seek—as we have been here compelled to seek,—a court's interpretation of those regu-

lations and its determination as to whether he had brought his case precisely within their terms.

In this connection, the oral opinion of the learned trial court, rendered in announcing his decision herein, is illuminative. Judge Van Fleet then said, in part:

“So far as concerns the defense that the company is excused by reason of the failure of the plaintiffs to have the message repeated, assuming that the company could contract against its gross negligence, which I doubt, my view is this: Here are persons going to a telegraph office, unfamiliar, as most of us are, with the exact character of the rules and regulations governing the transmission of telegrams; they hand in a message to the agent, inform him of its importance, and submit to him the question as to what means shall be adopted to insure the prompt and efficient transmission of that message, and the agent undertakes to inform them as to that method, and they conform to his instructions, and pay such increased toll,—in this instance substantially, if not precisely, what they would have been required to pay for a repeated message, some few cents one way or the other. Now, under such circumstances, it seems to me that it does not lie with the company to say that they are excused because of the mere formal insufficiency of that arrangement, which was suggested by their own agent. I think that the court is entitled to hold that it was in substance and effect a contract for the immediate transmission and the repetition of that message, if that was deemed by its agent the best method of insuring its prompt delivery. In other words,

I think that it was in effect a contract of insurance for the immediate delivery of this message. It is true, the agent testified that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it.' Certainly, if corporations of this character employ people whose mental and physical makeup is such that important instructions may pass in one ear and out the other, with nothing to interrupt such passage, the responsibility for that defect should not rest upon the patron; it should rest where it belongs, with those who employ the agent; and, therefore, I am unable to sustain that defense." [Tr., pp. 163-164.]

But it is insisted on behalf of defendant that the terms of the message blank constitute a written contract whereunder, in point of fact, the message was sent, and that this written contract must be brushed aside if effect be given to the verbal contract of insurance. [Petitioner's brief, p. 29.] Plaintiffs might very well content themselves with answering that the verbal contract is the one found by the trial court to have been actually entered into, and that even if such finding were erroneous, "it cannot be held to be an error of law," (*Jefferies v. Mutual Life Ins. Co.*, 110 U. S. 305), for which alone can a reversal be had in this court. (Rev. Stats. Sec. 1011.) It might even be argued by plaintiffs that, as there is no explicit finding that the special contract of insurance was merely oral, it will be presumed, in support of



the judgment, that such contract was in writing. However, plaintiffs are under no necessity of confining themselves to these propositions.

As will be seen in the next succeeding subdivision of this brief, the stipulations on the message blank, as properly construed, not only do not inhibit, and are not in conflict with, the verbal contract of insurance found by the court, but, by necessary implication, they contemplate such verbal contracts in cases in which the insurance is against *delays* as distinguished from *errors* in transmission. Apart from this, however, in all cases in which it is sought by a public service corporation to bind a person dealing with it by the terms appearing on a message blank, a ticket, a bill of lading, or a receipt, the question primarily to be determined is whether or not the instrument relied upon does, *in reality, constitute the contract* between the parties. If there be a meeting of the minds in an oral understanding,—the attention of the patron not being specifically directed to the terms of the writing and he being ignorant of any conflict between them and the bargain verbally concluded,—it is universally held that the latter constitutes the real contract and that it would operate as a fraud and deceit upon him to measure his rights by the terms of a writing which he was justly entitled to regard either as merely evidentiary of the actual understand-

ing or, at least, as not in conflict therewith. Accordingly, in the case of *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, where it was similarly urged that when a carrier gives a shipper a bill of lading, no parol evidence can be received to vary its printed terms, this court said:

“Before this rule can be applied, the contract in writing *must be shown to be the contract of the parties.*”

111 U. S. 591.

Defendant in the case at bar failed signally to make the showing that would have precluded the introduction of evidence of the verbal contract of insurance. The trial court found such a contract to have been made, and although defendant cannot now attack that finding, it may with propriety be pointed out that, under the evidence, no other finding was possible. Plaintiffs came to defendant's Oakland office with their message already written out on one of the company's blanks. [Tr., p. 81.] They did not tender the message in that form for transmission, but requested to be advised by the receiving clerk how they should proceed in order to have defendant insure the immediate transmission and delivery of the same. [Tr., pp. 100-101.] In other words, they indicated unequivocally to defendant's agent that the form of contract usually assented to in silence by the

senders of telegrams, did not suit their needs and was *not* to be regarded as receiving *their* assent. They demanded something more particularly calculated to safeguard their interests. [Tr., pp. 80, 97-98, 100-101.] Quinn, the agent, did not make the slightest pretense that he could not, for lack of authority or otherwise, contract in terms other than, or in addition to, those appearing on the message blank. On the contrary, after first assuring himself that the lines to Yerington were in working order, he undertook to point out to plaintiffs a special mode of contracting for the insurance of promptness, and this mode was in all respects adopted by them. [Tr., pp. 80, 101-102.] It embraced

(a) The addition to the message of the direction, "Deliver immediately," written thereon by Quinn himself;

(b) A charge of the company's ordinary rate, plus the connecting telephone line's ordinary rate, for the whole message (including these additional words);

(c) A charge of an *extra half-rate* based on both ordinary rates for the whole message (including the added words).

It therefore appears that defendant *did* receive a consideration for the insurance of the message in addition to its repeated message toll. Of course, plaintiffs were not advised respect-

ing the items going to make up the aggregate charge, but they did know that they were paying an extra rate. When, conforming themselves to Quinn's instructions, they paid the additional rate and handed him the message as previously written out by them on defendant's message blank, there could have been no question in the minds of either of the parties but that the message was to be sent under the verbal contract of insurance.

In the ordinary case involving the controlling force of the stipulations appearing on a message blank, ticket, or bill of lading, some sort of assent is given to the written terms *after* the conclusion of the oral negotiations. Here plaintiffs, *ab initio*, rejected the company's ordinary form of contract as not answering to their requirements, and demanded the assumption of a different degree of responsibility on its part. Hence neither of the parties can be regarded as looking upon the printed stipulations in the light of the formal embodiment of the terms orally agreed upon. If, after bargaining, the two parties to a contract in any manner adopt a writing dealing with the subject-matter of their negotiations, they must, in the absence of anything savoring of fraud or deceit, be regarded as having intended that writing to embrace, and to have merged in it, all of the matters upon which they have agreed. But

when such adoption is expressly withheld,—even though the same paper on which the printed stipulations appear may be used for the purpose of setting forth the message to be transmitted under special and different terms,—*the printed matter is not the contract of the parties* and the verbal understanding can alone be looked to.

Even where there is no express rejection of the terms of the writing at the time of entering into the contract, the mere circumstance that a distinctly different oral agreement is made, precludes the possibility of the writing being the contract actually entered into; and this is true even where the acts relied upon as an adoption of the writing are done subsequent to the conclusion of the oral negotiations. The public service corporation which, in such cases, is always the party relying upon the writing, is the one who has been the draughtsman and who is familiar with its terms and meaning. Usually, the other party (as was found to be the fact here), is wholly ignorant of those terms. In any event, in case of doubt, he relies upon the corporation's interpretation of its own regulations. He is not on an equal footing with the corporation in this regard, and his necessities place him under a very real form of compulsion in acceding to whatever it demands or suggests. Hence, as has been seen, the appar-

ent merger of the oral negotiations in the writing is always susceptible of being negated by a showing of circumstances that point to those negotiations, rather than to the writing, as constituting the real contract. When such a showing is made, any contradiction or inconsistency is resolved against the party who, despite the verbal understanding, has supplied an instrument at variance therewith. The obvious violation of the duty of fair dealing imposed upon the corporation, requires the application of such a rule.

This exception to the general rule that the written stipulations are binding upon the person dealing with the company, whether or not he has read them, is thus declared in 1 *Elliott on Contracts*, section 53:

"In the first place the nature of transactions may be such that the person accepting the ticket, bill of lading or the like may believe, and justly so, that it contains no terms *other than those already agreed upon* and that it is merely an acknowledgment thereof *not intended to introduce any special terms*. \* \* \* So, ordinarily, when a shipper is given a bill of lading which embodies terms *different* from those *orally* agreed upon, *he is not bound thereby*." [Citing numerous cases.]

Of course, even if the stipulation to the effect that "no employee of the company is authorized to vary the foregoing," were suscept-

ible of a construction making it applicable to anything but the *rates* of insurance of *correctness* in transmission,—which we deny,—what has been already said in support of the contention that the verbal agreement,—and not the terms of the message blank,—constitutes the real contract between the parties, is at least equally demonstrative of the fallacy of any argument based on this stipulation. Regarded as a notice, it fails of binding force because not brought home to plaintiffs; while, on the other hand, it cannot be one of the terms of the contract between the parties for the reason that plaintiffs were necessarily misled into the belief that the mode of contracting suggested by defendant's agent in answer to their inquiry upon the subject, was one authorized by its regulations and binding upon it.

To counsel for defendant, it has seemed that the written stipulations and the oral contract of insurance concerned the same matter, namely, the measure of damages for delays in transmission and delivery. [Petitioner's brief, p. 29.] This, however, ignores the fact that the message was not sent either (a) as an *unrepeated* message, or (b) as a *simple* repeated message, or (c) as a message whereof *correctness* in transmission was insured. The stipulations specify a measure of damages for the defaults of defendant with respect to each one of these

classes of messages. But as for (d) messages "specially insured" against *delays*,—while the stipulations expressly recognize this type of insurance as one which the company is willing to undertake, no corresponding measure of damages is therein specified. That is to say,—the subject-matter of insurance against *delays* is not dealt with in or by the stipulations, except only in so far as it is accorded the recognition referred to. Neither the *rate* to be paid for this class of insurance, nor the necessity for a *written contract* with respect thereto, is even hinted at in the message blanks. It having been found that the message *had* been "specially insured" against *delays*, the written stipulations respecting damages became wholly inapplicable,—as much so as though the message had been written on a blank sheet of paper.



II.

**The Stipulations on the Message Blank Do Not, as Properly Construed, Relieve Defendant From Liability for Its Negligent Delay Herein, Even If No Gross Negligence Were Imputed to It by the Court's Findings.**

- (a) THE STIPULATION PRESCRIBING THE MODE IN WHICH THE SPECIAL INSURANCE OF MESSAGES MAY BE EFFECTED, DOES NOT REQUIRE A CONTRACT IN WRITING EXCEPT WHERE THE INSURANCE IS AGAINST ERRORS IN TRANSMISSION, AND, ACCORDINGLY, THERE IS NO INHIBITION UPON VERBAL INSURANCE AGAINST DELAYS.

The stipulation on defendant's message blanks respecting the *insurance* of messages, is in part as follows:

*"Correctness in the transmission of the message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent., for any distance not exceeding 1,000 miles, and two per cent., for any greater distance. No employee of the company is authorized to vary the foregoing."* [Tr., pp. 55-56.]

This portion of said stipulation defendant invokes to relieve it from liability under the spe-

cial contract of insurance against *delay* in delivery upon which plaintiffs rely,—the argument being that, by its terms, all *oral* contracts of insurance against *any character of default whatsoever* on defendant's part, are inhibited. However, this is not the sole provision on the subject of insurance contained in the stipulations on the message blanks. Insurance of messages against *delays* is dealt with in an earlier clause thereof; and upon a consideration of those stipulations as a whole, it will become apparent that no *mode* is prescribed for the effecting of valid contracts of insurance against *delay*, and hence that an *oral* contract insuring promptness is binding upon defendant.

Provision for the 'special insurance' of messages against *delays*—as distinguished from *mistakes*—is made in that paragraph of the stipulations printed on the back of defendant's message blanks which immediately precedes the clause above quoted and whereof the subject matter is the insurance of "*correctness* in the transmission." The paragraph referred to is as follows:

"To guard against mistakes or delays, the sender of a message should order it REPEATED: that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be

liable for mistakes or *delays* in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or *delays* in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, *unless specially insured*, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.]

Taking the terms of these stipulations together, they constitute a classification by defendant telegraph company of all messages transmitted by it under three general heads, as follows:

- 1st. *Unrepeated* messages;
- 2nd. *Repeated* messages;
- 3rd. Messages "*specially insured*" against "mistakes or *delays* in transmission or delivery" or against "non-delivery."

Of this last class of messages, those in which "*correctness* in transmission" is to be insured, must be "*insured by contract in writing*," and, for *such* insurance, premium must be paid at the rates specified on the blank.

The provision requiring a writing, together with that prescribing special insurance premium rates, applies only to messages *correctness* in

the transmission of which is insured. The gist of the present action is *delay*,—not mistake. Therefore, there is nothing in the terms printed on the telegraph blank inconsistent with plaintiffs' right to effect, in the manner found by the trial court, an insurance of *immediate* transmission and delivery in consideration of the payment of a rate in excess of defendant's regular charge for ordinary, *i. e.*, *unrepeated* messages. [Findings VIII, X, XII; Tr. pp. 51-53, 56.] Nor is there anything inconsistent with those terms in the fact that the rate paid by plaintiffs was less than the sum that would have been necessary to meet defendant's premium charge if plaintiffs had been seeking,—what they were *not* seeking,—insurance of *correctness* in transmission.

To elaborate: It appears that defendant does insure both *correctness* of transmission and delivery and also *promptness* therein. To insure "*correctness* in transmission," defendant specifically requires "a contract *in writing*" and payment of a premium at the rate set forth. Therefore it follows, by necessary implication, that to insure *prompt* transmission and delivery any form of contract is sufficient, since there is no special requirement of a writing, or other formality, for this case. And it is to be noted that as no premium rate is stipulated for *this* class of insurance, the last sentence of the para-

graph specifying the rates for insurance of *correctness*,—to-wit, “No employee of the company is authorized to *vary* the foregoing,”—is wholly inapplicable to the case at bar.

Counsel attach considerable importance to the fact that the additional charge exacted by defendant for the insurance of *promptness*, was only 47 cents; while to have insured *correctness* in transmission, the premium would have been \$112.50 if the agreed amount of risk had corresponded with the face of the draft sought to be intercepted. [Petitioner’s Brief, pp. 26, 31.] However small the charge actually made, it was the precise sum that defendant saw fit to name for undertaking to indemnify plaintiffs for the consequences of any delay on its part. Plaintiffs had no means of determining whether it was within the authority of defendant’s receiving clerk to contract for such indemnity for a small or for a large fee. The message blank gave no information on this head. While the stipulations provide for an extra half-rate for repeated messages, not a word appears therein touching at all the matter of a charge for that “special insurance” against delays that we have seen to be contemplated by their terms.

Moreover, plaintiffs were not charged, in separate items, 98 cents for the transmission of the message and 47 cents for its insurance against delays. On the contrary, defendant

named an aggregate sum of \$1.45 for the entire service and undertaking sought, and plaintiffs were told merely that this was *in excess* of the regular rate, without any information being furnished as to how much in excess thereof that sum was. Hence, for all that appeared to them, the charge of \$1.45 might have been made up of three items,—one for the *transmission* of the message, another for its *repetition*, and a third for its *insurance*. If, contrary to the findings, plaintiffs had read or had otherwise been advised of the terms of the message blank, they would have received no information on this head. The fact that premium rates for the insurance of *correctness* are thereon specified, while nothing is said on the subject of premium or special charge of any kind for the insurance of *promptness*, would lead to the inference that nothing was requisite, beyond the repetition charge, in order to effect the latter class of insurance, *except notification* to the company that the message was offered for transmission and delivery as one “specially insured” against *delay*. The fact that a rate of charge is specified for insurance of *correctness* furnishes no ground for an implication that an *identical*, or even any other *special*, rate is established for insuring against a wholly different kind of default on the company’s part. It might very well be that defendant was will-

ing to make special efforts to secure *promptness* in the transmission and delivery of a message, without any charge beyond that for a repeated message, in a case in which it assumed no responsibility as an insurer of *correctness* and, accordingly, might safely omit,—as it did in fact here omit,—to perform what we shall later see to be the vain act of repetition.

But the all-sufficient answer to the argument based on the amount of the tolls is that defendant—not plaintiffs—fixed a flat rate for the service and indemnity specially contracted for; that such amount was in excess of the regular charge for such a message; and that it was paid by plaintiffs after they had put themselves entirely in defendant's hands in that regard, without any notice that they could have gained from the message blank whether or not it corresponded with the charge usually exacted by the company for insuring promptness.

Apart from all this, however, the testimony adduced by defendant demonstrates the insincerity of its present contention that the message blanks specify any rate of charge for the insurance of promptness. The witness Quinn was in charge of defendant's Oakland office, as receiving clerk, at the time plaintiffs presented themselves thereat for the purpose of having forwarded the message here in question. [Tr. p. 132.] His testimony on this as on all other

points, is enlightening. He declared that the company *did not insure messages at all*,—that he *would not have accepted* any message whereof prompt transmission and delivery was sought to be *insured*. [Tr. p. 146.] Yet he admitted thorough familiarity with the stipulations on the message blank. [Tr. p. 146.] There are two possible inferences to be drawn from this evidence. Not only must the insurance stipulation have been regarded by defendant and its agents as a ~~mere~~ subterfuge designed merely to furnish defendant means of escape from the consequences of its own failure to perform its legal obligation with respect to messages entrusted to it,—and not to afford the sender indemnity in any case in which he may choose to pay therefor; but, in addition, the exorbitancy of the only rate for insurance prescribed, namely, that for insuring correctness, must have been considered effectual to prevent patrons from applying for the indemnity ostensibly contemplated by the stipulation. That such rate ~~was~~, in fact, prohibitive is apparent from the same witness's further testimony. Not only had he never insured a message or had one offered for insurance [Tr. p. 141], notwithstanding he was stationed at defendant's main office in a large city, but if one had been so offered he would have declined to accept it on *any* terms as an *insured* message, no matter



what premium had been tendered. [Tr. pp. 146-147.]

Whether defendant or the Interstate Commerce Commission be responsible therefor, we are unable to say, but it is significant that, at the time of the Commission's decision in the case of *Cultra v. Western Union Tel. Co.*, 44 I. C. C. 679 (relied upon by defendant), the graded insurance rate specified upon defendant's message blanks had been cut from *one* per cent for distances not exceeding 1000 miles, and *two* per cent for greater distances, to a flat rate of *one-tenth of one per cent*. If, in May, 1917, and (as stated by the Commission) "for a long time" prior thereto, defendant could afford to insure messages for one-tenth of one per cent, notwithstanding the notorious increase in its costs of operation in recent years, is it possible to justify as reasonable or even as bearing the slightest relation to the risk incurred or the service rendered, a charge either of ten or twenty times that rate for the assumption of the identical liability in April, 1907?

(b) EVEN IF,—CONTRARY TO THE FACTS AS FOUND,—THE MESSAGE HAD NOT BEEN SENT UNDER A SPECIAL CONTRACT OF INSURANCE FOR AN EXTRA TOLL, THE STIPULATION OF NON-LIABILITY FOR UNREPEATED MESSAGES COULD NOT OPERATE TO EXONERATE DEFENDANT, FOR COMPLIANCE WITH ITS TERMS WOULD HAVE NO TENDENCY TO PREVENT DELAYS ARISING FROM GENERAL CAUSES, BUT WOULD CONDUCE ONLY TO THE CORRECTION OF ERRORS IN TRANSMISSION AND, THEREFORE, ONLY TO THE AVOIDANCE OF DELAYS CHARGEABLE TO SUCH ERRORS.

Even if there were not present in this case the unique feature of a special contract of insurance against delays and the payment of an extra charge as the consideration therefor, still plaintiffs, on a proper construction and application of the repeated message clause of the stipulations on the message blank, would be entitled to recover. It will be remembered, for the purposes of the present discussion, that the message as first transmitted and delivered, three days after it had been sent, was *correct in verbiage*, address and all. With that fact in mind, reference should again be had to the precise terms of the stipulation of non-liability for unrepeatd messages. They are as follows:

"To guard against *mistakes or delays*,\* the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for *mistakes or delays* in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; \* \* \*" [Tr. p. 54.]

For the purposes of the argument on this head, it will be assumed,—contrary to the fact as found [Tr., pp. 53, 56],—that the entering into the special contract of insurance did not embrace an undertaking on defendant's part to repeat the message. It should be observed, however, in passing, that as the stipulations on the message blank provide ~~duly~~ <sup>only</sup> for the insurance <sup>of</sup> ~~only~~ repeated messages, plaintiffs' direction that their telegram be sent as an *insured* message necessarily embraced an order for its repetition, or for anything else that defendant's rules might require.

The purpose of the stipulation requiring the repetition of messages is by its own terms declared to be, "to guard against mistakes or delays"; and the repetition is thereby defined as a "telegraphing back to the originating office for comparison." The case at bar arises *not* out of a *mistake* in transmission, but out of *delay* in transmission and delivery, whereby the

message entrusted to defendant did not reach the addressee for three days, and accordingly failed of its purpose. Now, the only *delay* that could possibly be prevented or lessened by a *repetition and comparison* of the message, is obviously such a delay as would result from a mistake in the transmission of the name or address of the addressee. Repetition itself takes as much time as the original transmission of the message, and if no mistake in the address is thereby discovered and corrected, the very act of repeating tends to delay rather than to expedite. In the case at bar, the message—address and all—was correctly transmitted, and therefore the delay complained of was in no way connected with the failure—even had there been such a failure—to have the message repeated.

A corporation discharging such a public calling as that assumed by a telegraph company can impose upon its patrons only such regulations as are *reasonable*; and for a regulation to be reasonable in any sense, its observance must in the nature of things, *tend to effect that which it is professedly aimed*. On this very ground, the stipulation as to repetition has been sometimes upheld (although declared void in many jurisdictions), as a reasonable regulation relieving the company from liability for *mistakes in transmission*, and for *such delays in delivery* as would have been prevented by the

repetition. The courts, however, have never permitted a telegraph company to shield itself, behind this stipulation, from liability for *delay* in delivering a telegram, except when repeating the message would have naturally tended to prevent the delay,—and then only when the company was *not* grossly or wilfully negligent.

The moment the company attempts to stretch such a stipulation limiting liability, to cover a case wherein compliance with its terms would have no imaginable tendency to prevent the default with respect to which exemption is sought,—that moment and to that extent the stipulation becomes an *unreasonable* regulation, and, notwithstanding its *literal* import, the law grants the injured party relief.

A case exactly in point, wherein the views here expressed are fully sustained, is that of *Box v. Postal Telegraph Cable Co.*, 165 Fed. 138. The court there says of the stipulation respecting the repetition of messages:

“The rule is not intended to secure a timely effort to *send* the message, but to make more certain its *accurate transmission*. The company is under obligation to send the message with reasonable promptness for the regular rate when it receives such rate and accepts the message. \* \* \* The message must, of course, be sent *before* it can be repeated; it must be sent and repeated before any comparison could be made. Although the regulation purports

to be made to guard against mistakes or delays, it should be construed to refer to *such mistakes and delays as could be corrected or avoided by repetition and comparison*; otherwise, a delay caused by the conduct of the company in negligently failing to send or to attempt to send the message would come within the rule. And it is held that it does not apply where 'no effort was made to put the message on its transit.' *Birney v. N. Y. & W. P. Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607. It is difficult to believe that the stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible for the message to be repeated*. We believe it would be wholly unjust and not within the intention of the contracting parties to permit this rule to exonerate the company from liability for a failure which, like the one here charged, would *not have been prevented by repeating the message*." [Citing numerous authorities.]

165 Fed. 141.

In *Purdom Naval Stores Co. v. Western Union Tel. Co.*, 153 Fed. 327, it was held that the stipulation for non-liability in the case of unrepeatd messages was inapplicable where there was an utter failure to deliver the message at all.

In *Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, the Circuit Court of Appeals for the Ninth Circuit distinguished *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, from the case in

hand (which was one of delay in transmission due to a connecting line's wires being down), on the grounds, 1st, that the company was advised of the importance of the message and of the time when it would have to be delivered, and then undertook to transmit and deliver the same after satisfying itself of its ability to do so; and, 2nd, that within ten or fifteen minutes after the filing of the message the company became aware of the interruption in its transmission.

A somewhat fuller exposition of the reasoning whereunder the courts have refused to accord to the stipulation of non-liability for un-repeated messages, the effect of relieving the company from the consequences of delays not occasioned by the failure to have the message repeated (and which, accordingly, repetition would not have tended to prevent), are found in the Nevada and Missouri cases hereinafter cited. In *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 50 Pac. 438, the action was for delay in delivery not due to any mistake in the name or address of the addressee. The court there said:

"The evident and *only* objects in having telegraphic messages repeated are to enable the operators transmitting and receiving the same over the wires to readily *detect and correct any mistakes or errors* they might make in the message as received for

transmission and delivery, and thus enable the defendant to avoid such errors, and their legal consequences. A delay, or the non-delivery of a message, might be caused by mistake made by the operators in the name or the address of the person to whom the message is sent, which might be detected and corrected if the message was repeated, and thereby delay or the non-delivery of the message be avoided. \* \* \*

When the repetition of the message could *not* have had any *tendency to prevent the delay* in the case, and when the delay was *in no manner attributable to its not being repeated*, the stipulation cannot, in our opinion, be held, with any degree of reason, to have the effect of restricting the defendant's said liability. To consider that the minds of the parties met and agreed that the defendant's liability should be restricted for delay in delivering the message after it reached the Lovelock office, although it might be transmitted to and taken off there without any mistake occurring, it seems to us would be without reason, and would be ascribing to the parties an intent to relieve the defendant from the legitimate consequences of making default in the performance of a legal obligation, however great the damages might be to the plaintiff resulting therefrom, simply because he did not see fit to have the message repeated, and pay an additional sum therefor, although the doing of it might prove to be *utterly useless and nonsensical as a preventive* of such default. So long as the parties are to be regarded as legally competent to enter into contracts, we cannot impute to them any such intent. If the telegraph company had such intent in plac-



ing such stipulations on its blank forms, then, evidently, its object was to deceive its patrons, and entrap them into unconsciously relieving it from liability for non-performance of a plain legal and moral obligation. We are not willing to ascribe to it such intent or object. The repetition of the message would have had no legitimate effect to induce or to expedite the delivery in this case. 'It is clear that, if such a stipulation, assented to, is sustained as having the force of a contract or condition, the company is under no obligation to deliver any unrepeatd message. For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void.' 3 Suth. Dam. § 958."

50 Pac. 437-440.

In *Jacobs v. Western Union Tel. Co.*, 196 Mo. App. 300, 196 S. W. 31, the action was for failure to deliver the message until ten days after its transmission to the office of destination. After citing *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, as sustaining the stipulations on the message blank in limiting "liability for delays, misdelivery and incorrect transmission," the court says:

"But we think there is no ground in this case upon which to apply the limitation to the price of the message on account of it not having been repeated, for the reason that the mischief committed here was not in the transmission. It was correctly sent, and therefore to repeat it would not have had any tendency to lessen the 10 days'

delay in delivery. \* \* \* There was nothing in the message that caused the delay, or that repeating of transmission would have cured. To repeat a message will correct any error in transmission, but how it could have any influence or application to failure to deliver to the sendee is difficult to understand. \* \* \* That part of the company's limitation of liability for an undelivered, unrepeatable message can only apply to something where repeating would reasonably tend to its benefit in the matter of delivery. Thus, if error was made in the name or address of the sendee, it would directly affect the delivery; but if the entire telegram is right in the first instance, this reason does not exist. \* \* \* *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 520, 7 South. 419, 18 Am. St. Rep. 148; *Railway v. Wilson*, 69 Tex. 739, 7 S. W. 653; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 235, 9 Am. Rep. 136; *Thompson v. Telegraph Co.*, 107 N. C. 449, 457, 12 S. F. 427."

196 S. W. 33-34.

This court further suggests, without deciding the point, however, that a stipulation limiting the company's liability to the charge collected,

"is not, properly speaking, a contract at all \* \* \* but a declaration that there is no liability; since the sum paid would be due the sender by reason of the unperformed service, without such stipulation. The so-called agreement is nothing more than a claim of one-sided right to wrongfully fail to perform the contract without being re-

sponsible for any damage occasioned by the wrong. \* \* \* to assert an unqualified release from all liability save to refund the charge collected for the unperformed service is, in effect, to claim non-liability for negligence."

196 S. W. 34.

In accord with the cases above quoted are the following:

*Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. 738, (Cir. Ct. D. Ore.), affirmed in

*Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, (C. C. A., Ninth Circuit);

*Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734;

*Bryant v. American Tel. Co.*, 1 Daly 575 (N. Y.);

*Birney v. New York, etc., Telegraph Co.*, 18 Md. 341, 359, 81 Am. Dec. 607;

*Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410, 44 S. E. 309;

*Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298;

*Western Union Tel. Co. v. Graham*, 1 Colo. 239, 9 Am. Rep. 136.

The cases upon this subject are collected in a note in

10 Ann. Cas. 857-860.

An attempt is made on the part of defendant to distinguish, on their special facts, the cases cited in support of the proposition now under discussion; but a moment's consideration will suffice to demonstrate that the divergences between them and the case at bar do not bring into operation any different legal principle. The supposed grounds of distinction relied upon divide the cases into two classes, viz.:

(a) Cases in which *no attempt* was made at all *to transmit* the message; and

(b) Cases in which the delay occurred *after a prompt transmission* to the office of the company at the place of destination.

The ground upon which the courts have refused to apply the stipulation of non-liability for unrepeatd messages to the former class is, as stated in the *Box case, supra*, that "it is difficult to believe that the stipulation was intended by the parties to be applicable to a case in which *the conduct of the company made it impossible for the message to be repeated.*" With respect to the latter class of cases, the *ratio decidendi*, as declared in the *Barnes case, supra*, is that "the repetition of the message would have had *no legitimate effect to induce or to expedite delivery.*"

Now, in the case at bar, we have such conduct on the part of defendant as "made it impossible for the message to be repeated." Even were

this not true, the other ground of decision would still be present. Repetition presupposes a single completed transmission, in due season, to the office of destination. If defendant had completed such a transmission of the message in question either to Wabuska or to Yerington on the night of April 29th or early in the morning of April 30th, no repetition back to Oakland from either of those points would have had any "legitimate effect to induce or to expedite<sup>delivery</sup>" A repetition from Wabuska would not have tended to make certain or prompt the performance by defendant of its obligation to deliver the message to the connecting telephone line, any more than a repetition from Yerington would have made certain or prompt its delivery to the bank.

Defendant neglected, for three days, to complete a single, through transmission of the message *even to its own terminus*, Wabuska. To apply the stipulation of non-liability for unrepeated messages to such a case would be to hold that defendant may or may not transmit such a message promptly or at all, according to its whim or its mood of indifference at the time, and that, in case it does not, it will be absolved of all liability except for the charge collected by it for the service it has failed to perform. And this would be true even where the default was deliberate and willful. There is, however, an

obligation imposed by law upon a telegraph company from which it cannot escape, no matter what may be the terms it seeks to impose upon the sender. It must exercise "great care and diligence in the transmission and delivery of messages," and where no unavoidable interruption of the working of its lines is shown, that comprehends a single, through transmission of the message with reasonable promptness after it is accepted for such transmission. There is, in the record, evidence to the effect that such a message as the one in question could be transmitted from Oakland to Yerington "within 20 or 30 minutes" [Tr. p. 153], and even defendant's witness, Quinn, testified that this could be accomplished within 30 minutes, although ordinarily "one hour at least is the time I would consider." [Tr. p. 143.] If defendant had made a single, through transmission of the message within even 10 or 11 hours, it would have sufficed; but when, at the end of some 72 hours, it finally transmitted the telegram to Wabuska and then to Yerington, it might just as well have never transmitted it at all, or never put it in course of transmission, for all the good it could accomplish for plaintiffs at that late date. Such a transmission was no transmission at all within the terms of defendant's undertaking.

There is an obvious fallacy in defendant's contention that cases in which the company does not put the message in course of transmission at all, are distinguishable from those wherein it is put in transit but is delayed at some intermediate point on the lines of the company. Until there is a thorough transmission of the message to the office of destination, there is no possibility of repeating it. The conduct of the company in any such case gives rise to this impossibility, and this is true no matter whether the failure to complete a single transmission is due to the message not having been put in transit or to that transit having been interrupted after it has commenced but before it has been accomplished. The doctrine of the *Box case*, *supra*, and others similar thereto is, therefore, strictly applicable to every instance in which the delay is not due to mistake but has occurred through failure to *complete* transmission *in due time* to the office of destination. What is said in the *Union Construction Company v. Western Union Tel. Co.*, 163 Cal. 298, to the effect that the stipulation of non-liability for unrepeated messages "should be interpreted to provide only for delays \* \* \* occurring in the forwarding of a message from the company's desk where it is received from the sender to the company's office where it is written out and made ready for delivery to the addressee," was wholly un-

necessary to the decision there rendered and is mere *dictum*,—the point decided being that the stipulation was inapplicable to a delay in delivery, after a prompt and correct transmission to the office of destination. And the reasoning on which the court determined that single point is precisely in line with that whereby we have endeavored to sustain this portion of our argument herein.

Even if the *Union Construction Company case, supra*, were to be regarded as an authority for the proposition that the stipulation in question is applicable to delays at any point between the sending and receiving offices, it would still avail defendant nothing; for, counsel to the contrary notwithstanding, the trial court did not find that the delay herein occurred at any point *intermediate* with reference to Oakland and Wabuska. The sole finding in this regard is that defendant “wholly failed and neglected to transmit said message to said Wabuska until May 2d, 1907”,—the third day after it was sent. [Finding XV, Tr. p. 58.] There is no finding ~~at all~~ as to when, if at all, it was put in transit. However, the evidence was that the message reached Reno, an intermediate relay point, about 40 minutes after it was accepted for transmission [Tr. p. 70], and that half an hour later [Tr. p. 119], it was transmitted by the Reno operator to an office that he *took to*



be Wabuska because it answered the Wabuska call [Tr. pp. 120, 124-125]; but the fact as found is that it did not reach the Wabuska office till the third day thereafter. [Tr. p. 58.] It was also in evidence that the same wire served Wabuska and numerous other points,—both those intermediate with respect to Reno and Wabuska and also those beyond Wabuska. [Tr. p. 122.] It is apparent, therefore, that the Wabuska call must have been answered by some other office, and it is in evidence that this was perfectly possible. [Tr. p. 124.] Now, as there was uncontradicted evidence that defendant's claims agent had admitted that the message was erroneously sent either to Goldfield or to Tonopah [Tr. pp. 96, 107-108], and as neither of those points was on the Wabuska wire [Tr. p. 123], the only possible finding upon the subject would have been that the delay occurred,—not at an intermediate point,—but at some point wholly off the only line over which it was possible to transmit messages to Wabuska or to Yerington. That this delay was wholly on defendant's lines and not upon those of the connecting telephone company, is expressly found. [Finding XV, Tr. pp. 58-59.] Despite a strenuous effort on defendant's part to prove the receipt of the message at Wabuska on the night it was sent, Mr. Harrington, its claims agent, testified that, except for Reno, he did not

find, in his investigations, any point to which the message was transmitted on that evening or at any time prior to May 2nd. [Tr. p. 131.] It is significant, however, that he never took the trouble to make any investigation of defendant's records either at Goldfield or at Tonopah. [Tr. p. 131.]

Counsel contend, on the erroneous assumption that the delay occurred at an intermediate point, that the repetition of the message would have been effective to obviate delay. As has been seen, the courts that have had occasion to consider this precise point, have been unanimous in holding that such is not the fact; and having regard to the nature of the act of repetition, it is impossible to understand in what way it could have lent itself to expedition. We find defendant's own witness, Quinn, in accord with us on this point. In attempting to account for his failure to advise plaintiffs to have their message repeated, he testified that he did *not* think "repetition of the message from Wabuska back to Oakland would have had *any tendency to assure delivery*," and that defendant does *not* notify the senders of *repeated* messages "*if no repetition comes back*," but only of *non-delivery* "upon receiving a notice to that effect." [Tr. pp. 148-149.]

If the operator who impersonated defendant's Wabuska agent, had repeated the message, no-

body but himself would have been any the wiser and the same delay would have occurred. The whole trouble with repetition, in a case such as the present, is that it is valueless as a safeguard except for the detection and correction of errors in a message that has once been transmitted *to the office of destination*. It presupposes that the company's operators will at least complete the initial transmission to the office named in the address. The repetition provided for is not merely a telegraphing back from *each successive relay point* to the office from which the message was *immediately* received. It is a repetition from the point of *destination* back to the *originating office*. In some form, the message must have been sent through to the correct destination before there is anything upon which the stipulation as to repeating can operate.

To order a message repeated does not tend to render more certain the performance of this initial duty resting upon the company. True, such an order is some notice of the *importance* of the message; but it is more especially a notice that the *correctness* thereof is the matter particularly to be safeguarded, than that special speed is sought, since the repetition is declared by the message blank to be "*for comparison*." Moreover, how could such notice come to the attention of the operator at the point of destination unless the company discharged its primary

duty of once transmitting the message through to that point? As for notice in the case at bar, the findings set forth at length the insistence of plaintiffs upon the necessity for immediate transmission and delivery, upon the amount of the loss that they would suffer in event of delay, and upon the assumption by defendant of full responsibility for delays. [Finding VIII, Tr. pp. 49-51.] If the message had been ordered "repeated" a dozen times over, defendant could not have been half so effectually advised of the imperative call for promptness and of the risk it would assume in undertaking to effect a delivery that would answer plaintiffs' necessities.

Of course, as defendant points out, it is not repetition merely that the stipulation requires or contemplates. The more important thing is the *extra charge* thereby imposed upon the sender if he desires to avail himself of the option to send the message at the risk of the company, instead of at his own. There is, however, scant comfort for the defendant in this circumstance; for plaintiffs exercised that option by sending their message at defendant's risk and paid therefor the extra toll demanded by it for the assumption of liability as an insurer against delays.

Defendant's argument in support of the proposition that repetition would have prevented delay, proceeds as though the stipulation were

so framed as to require the originating office (in nautical phrase) "to stand by" pending the repetition, and, failing its prompt receipt, to make further efforts to supply the failure to transmit, that counsel assume would be thereby demonstrated. But the terms of the stipulation preclude any such idea. The message is to be telegraphed back,—not to advise the originating office that it has been transmitted to the designated destination,—but "for *comparison*" of the verbiage that is repeated with that of the original draft. Apparently, the originating office of defendant goes about its ordinary affairs and completely dismisses from mind, after putting it in transit, even a repeated message, except to receive the repetition (if, ultimately, it be made), and to compare it with the original. (See, in this connection, the testimony of Mr. Quinn, last above referred to.) There is no hint in the record that, at intervals or at all, defendant sends out "tracers" or makes additional efforts to secure a through transmission, in the event that a message *ordered* repeated is not *in fact* repeated. On the contrary, after plaintiffs had been allowed to wait some fourteen hours without any effort being made by defendant even to learn the fate of the message, they called at the Oakland office only to be advised that "the message had gone out on time, but had not been repeated," and that defendant

would use the extra money they had paid for the insurance of promptness to send out a "tracer." [Tr. p. 106.] So that not only did defendant *know* that the message was one calling for repetition and that it had *not* been repeated, but it took the position that it was *under no obligation* to make any effort to speed up even a repeated message or, except at plaintiffs' expense, to learn its fate. This conduct on defendant's part constitutes a practical construction by it of the stipulation as to repetition conforming precisely to plaintiffs' contention that that stipulation was not designed to accomplish anything but the detection and correction of errors in transmission.

**(1) Cases on the Repeated Message Clause Cited by Defendant.**

Counsel place their chief reliance upon *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, claiming that the decision of the Circuit Court of Appeals herein is in conflict with the doctrine of that case. Nothing could be farther from the fact. That case establishes the validity of the stipulation of non-liability for un-repeated messages for the purpose of exonerating the telegraph company from responsibility for *mistakes* in transmission,—not for *delays* therein or in delivery. The ground upon which this court so decided is indicated in that pas-

sage of the opinion declaring that the stipulation gives the sender of a telegram "the *option* to send it in such manner as to hold the company responsible, or to send it for a *less* price at *his own risk*." [154 U. S. 16.] Now, even if it were assumed that the physical act of repetition would have a tendency to obviate delays not attributable to error in the name or address of the addressee,—which, of course, we deny,—nevertheless the quotation just made from the opinion in the *Primrose case*, *supra*, effectually disposes of any adverse bearing it might otherwise be supposed to have upon the decision of the Circuit Court of Appeals in the case at bar. Here plaintiffs availed themselves of their option by sending their message at a rate *in excess* of the ordinary tolls in order to hold defendant responsible for delays, and *expressly rejected the alternative* accorded them "to send it for a *less* price at *their own risk*." When plaintiffs contracted and paid for defendant's responsibility for delays, they did all that was required of them even under this doctrine of the *Primrose case*; and it is not too much to say that this court there recognizes the soundness of the distinction upon which we insist.

The opinion in that case speaks, without discriminating between them, of delays, as well as mistakes, in transmission and delivery; and

this is as might be expected, for the stipulation in question itself deals indiscriminately with both. Whenever delay is mentioned, it is as an incident to the discussion of the subject of mistakes in transmission and merely because the two matters are dealt with conjunctively in the stipulation.

All of the cases cited by defendant are distinguishable upon the same ground. In none of them was there a *special contract* of any kind, whether for the repetition of the message or for the insurance of its immediate transmission or delivery. In none of them was any charge paid in addition to the ordinary tolls. In none of them was there any attempt by the sender of the message to procure a different type of service, or a different measure of responsibility, than such as is regularly given by the company for its ordinary charge and on its ordinary terms. In none of them was there any special mode of sending the message suggested by the company or adopted by the sender,—the message being simply offered for transmission written upon one of the company's blanks containing the usual stipulations. In the few instances in which the sender's ignorance of the terms of these stipulations was relied on, there was no element of fraud or deceit on the part of the company in supplying a writing at variance with the contract orally



negotiated. Hence, even those few of defendant's cases in which the gist of the action was *delay*, do not, by reason of the distinguishing features just adverted to, constitute adjudications adverse to plaintiffs, or at all in point herein. The great majority of them, however, arose out of *mistakes* in transmission other than in the address of the message, and, for that additional reason, have no bearing upon the present inquiry.

It may be helpful to indicate very briefly the precise point decided in each of the cases relied upon by defendant. This may be done in most instances, by a mere statement of the particular default complained of in each case, thus:

*Primrose v. Western Union Tel. Co.*, 154 U. S. 1,—*error* in the transmission of the body—as distinguished from the address,—of a cipher message.

*Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461,—*error* in the transmission of the body of the message.

*Western Union Tel. Co. v. Carew*, 15 Mich. 525,—*error* in the transmission of the body of the message.

*Western Union Tel. Co. v. Coggin*, 68 Fed. 137,—*non-delivery* of the message. The court

there placed its decision on the ground that it did not appear the message would have been understood by the addressee, nor that he would have complied with the request it was designed to convey, nor that the telegraph company had been advised what the message was about or respecting the amount of damage, if any, that would result from error in transmission,—matters that did not appear from the face of the message. The holding was that, under such circumstances, the company could not be regarded as having assumed any responsibility for defaults as to the consequences of which it was in the dark.

*Cultra v. Western Union Tel. Co.*, 44 I. C. C. 679,—the sole contention was “that rates, and rules of this kind affecting rates [referring to the repeated message clause] that limit the liability of a telegraph company *for errors in transmission* are unreasonable.”

*Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298,—*delay in delivery* of the message after it had been duly transmitted. All that the court says respecting the force of the repeated message clause to relieve the company from liability for delays prior to the receipt of the message at the office of destination, is mere *dictum*. The case is an authority supporting plaintiffs' contention.

*Ellis v. American Tel. Co.*, 95 Mass. 226,—*error* in the transmission of the body of the message. This case merely holds that in event of such a default, the repeated message clause is effective “if made known to those with whom they [telegraph companies] deal, and directly or by implication assented to by them [the senders].”

*Grinnell v. Western Union Tel. Co.*, 113 Mass. 299,—*error* in transmission consisting of the omission of a material word in the body of the message. While it is true that an offer was made at the trial to prove that a repetition would not have supplied the omission,—which offer was rejected,—the court, in sustaining such rejection, said: “The report does not show how such evidence could possibly have proved that fact.” Of course, although repetition may fail, in a particular instance, to detect and correct an error, nevertheless it is always a safeguard tending to accomplish that end, and the company is entitled to extra payment for the additional service involved in adopting this safeguard if it is to be held liable for defaults that might thereby have been prevented. This, however, is a very different thing from saying that the sender of a message must order it repeated and pay therefor when the default complained of is a delay not occasioned by any

error in transmission and when, therefore, repetition would *necessarily* have been an idle act having no tendency whatever to prevent that default.

*Clement v. Western Union Tel. Co.*, 137 Mass. 463,—*delay in delivery* of the message after it had been duly transmitted to its destination. The doctrine of this case is, of course, repudiated in the numerous cases hereinbefore cited, involving similar states of fact,—notably in *Union Construction Co. v. Western Union Tel. Co.*, *supra*, relied upon by defendant.

*Pearsall v. Western Union Tel. Co.*, 124 N. Y. 269, 26 N. E. 534,—*error* in the transmission of the *name of the addressee* consisting of the omission to transmit the words “and Company” in the name “T. W. Pearsall and Company,” whereby the message was not opened by the corporation but was allowed to await the return of the individual who was absent at the time. The telegraph company was held responsible; so that, as far as it goes, the case is adverse to defendant herein. The point of the decision, however, is that as the message had been written on a blank sheet of paper, the sender could not be held bound by the usual stipulations of the company with which he was familiar.

*Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 16 N. E. 75,—*non-delivery* of the message through *failure to transmit*. The doctrine of this case is, of course, necessarily repudiated in a number of the cases relied upon by plaintiffs and herebefore cited, notably in *Box v. Postal Tel. Cable Co.*, *supra*, and *Pacific Postal Tel. Cable Co. v. Fleischner*, *supra*.

*Riley v. Western Union Tel. Co.*, 28 N. Y. Supp. 581,—*delay* in the transmission of the message not due to error therein. The doctrine of this case is opposed to the later cases upon this question and hereinbefore cited.

*Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 33 L. R. A. 404,—*delay* in the transmission of the message. The case was decided on the authority of *Clement v. Western Union Tel. Co.*, *supra*, the doctrine of which has been repudiated, as we have seen. The precise ground of decision was that "the demand for its repetition is a notice of its importance, and of the necessity for promptness, additional to the language of the message itself." In the case at bar, what more in the way of notice could have been accomplished by "ordering the message repeated" (*in haec verba*) we are unable to conceive. The *Birkett* case, *supra*, is further distinguishable upon its facts. The court there said:

"If the order to repeat had been contained in the message we cannot say that the operator at Detroit [an intermediate point], upon finding that he could not get the office at Dearborn [the destination], would not have at once telegraphed to the plaintiff [the sender] that fact."

33 L. R. A. 408.

In the case at bar, there was an affirmative showing by defendant's own witness, Quinn, to the effect that, even though the message *had* been ordered repeated, defendant would *not* have notified plaintiffs in the event that no repetition thereof had been received at the originating office.

*Stone v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762,—*delay* in the delivery of the message. The case was decided upon the grounds (a) that the claim of loss was barred because it had not been filed within the time stipulated on the message blank, and (b) that "if the sender desires to have special care expended upon it, it is not unreasonable to ask him to *pay for such particular attention*," and that if the company "may be held liable for large damages, it must, for its own protection, *charge more for the service*." In the case at bar, plaintiffs were asked to pay and did pay an additional charge for the "particular attention" they demanded for their message and for defendant's extraordinary responsibility.

In most of defendant's cases, the senders of the messages were familiar with the terms of the message blanks, and even when not so familiar, their actions in offering the messages for transmission constituted assent to those terms. In addition, the great majority of those cases involved mistakes in transmission,—not delays therein or in delivery. But apart from these grounds of distinction, the case at bar is differentiated from all others that have come to our notice by the presence of the following elements, to-wit:

1. Explicit *notice* to defendant, (a) of the *importance* of the message and of the need of *great expedition*; (b) of the *time* within which delivery would have to be made in order to avail anything; and (c) of the *amount* and the particulars of the loss that would be entailed in the event of delay beyond that time.

2. Demand by plaintiffs that defendant assume the liability of an *insurer* against delays and their request for guidance as to how this might be contracted for in conformity to defendant's regulations. This, of course, involved rejection by plaintiffs of any idea of giving assent to any terms except such as corresponded with the directions that defendant undertook to give them.

3. The giving by defendant of the directions asked by plaintiffs, after it had satisfied itself

that the lines were in working order, and *plaintiffs' conformance to those directions* in all particulars, including the payment of an *extra toll* for the special attention and responsibility demanded.

4. Defendant's failure to repeat the message, or to make any special effort to expedite its prompt transmission and delivery.

5. The extraordinary and inexcusable character of the delay.

(c) THE STIPULATION OF NON-LIABILITY FOR MESSAGES FORWARDED OVER CONNECTING LINES IS NOT IN CONFLICT WITH THE SPECIAL CONTRACT OF INSURANCE AND HAS NO APPLICATION TO THE CASE AT BAR.

The stipulations on the message blank are to be construed strictly as against the company. Looking at the stipulation respecting connecting lines, we find that the company "is hereby made the *agent* of the sender, *without liability*, to *forward* the message over the lines of any other company when necessary to reach its destination." [Tr. p. 54.] That these terms cannot relieve defendant from liability in the present case is apparent from the following considerations:

(1) The stipulation contemplates non-liability only for those defaults *occurring on the connecting line*,—that is, during such portion of



the transmission as is *beyond* the originating company's immediate control. In the case at bar, the delay occurred *wholly upon defendant's lines*,—no delivery of the message to the connecting telephone line having been made or attempted for three days. [Findings XIII, XV; Tr. pp. 56-57, 58-59.] Of course, defendant is not acting as an agent to *forward* the message over a connecting line until it has completed the transmission thereof to its own terminus and at least delivered a copy to the connecting company.

(2) The stipulation has reference only to *telegraph*—not to *telephone*—lines. To send a message by telegraph requires special skill and training. This is not so with respect to the telephoning of a message, and therefore there is no reason for granting an exemption from liability with respect to forwarding messages by telephone.

(3) The stipulation applies only to those *casual instances* in which the company finds it necessary to forward a given message over other lines, and not to the case of a *standing agreement* or established practice whereunder the company forwards *all* messages for a given destination over another line selected in advance by it as the *permanent* instrumentality for that purpose. It would be strange, indeed, to have the sender of a message appoint the company

his agent to forward it over a connecting line when, at a previous time, the company had already arranged with that line to transmit all messages offered for transmission to destinations on the connecting line. To *ratify* a *prior* general arrangement and to relieve the company from liability for what may occur thereunder, is one thing; but to *appoint an agent* to forward over a connecting line is a wholly different matter, and contemplates that, *subsequent* to the appointment, the agent will negotiate with the connecting line for the forwarding.

(4) The stipulation does not inhibit the making of a *special agreement* to deliver beyond the terminus of defendant's lines; and such a special agreement was made in the case at bar.

On the facts found, it is apparent that the stipulation in question can have no application. Defendant *never exercised its agency* to forward the message in question until May 2nd, and no delay occurred on the connecting telephone line. Plainly the stipulation in question is intended to relieve defendant from responsibility for the negligence of the connecting line, over which it can have no control. Any other interpretation would render the stipulation itself void as unreasonable. To be in a position to invoke it, defendant *must have forwarded plaintiff's message promptly* and correctly; and to do this it must have transmitted the message

immediately to Wabuska and delivered it to Yerington Electric Company. The findings negating this situation render the stipulation respecting connecting lines wholly inapplicable.

It has been held that where a contract for the interchange of business and the division of tolls thereon, is entered into between two telegraph companies, the stipulation on the telegraph blank with respect to non-liability for delays occurring on connecting lines, does not relieve one company from liability for the negligence of the other.

*Postal Tel., etc., Co. v. Harriss*, 122 S. W. 891 (Tex.).

In *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79, it is held that where there are connecting telephone lines with a common agent at the connecting point, the first line is liable for the negligence of that agent in failing to make the connection between the two lines.

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Here, if ever, we have a case wherein is found ample justification for the bitterness of the attack made by the text-writers upon these telegraph stipulations. Plainly, as Thompson, Gray, Jones, and perhaps others point out, the stipulations as to repeating, insuring, *etc.*, were never *really* intended (despite the factitious appearance given them) to afford the public an

opportunity of securing, by payment of a reasonable consideration therefor, special speed or care in their telegraphic communications, or adequate indemnity for defaults when that special speed or care has been contracted for; but were adopted solely with a view to providing a loop-hole through which, under the guise of *limiting* liability, the company might *escape all liability* for the consequences of *every* instance of negligent, reckless, or even wilful misconduct.

### III.

#### **The Finding That the Delay Complained of Was the Result of Defendant's Gross Negligence Is Conclusive, and No Stipulation Can Exempt It From Liability for the Consequences Thereof.**

As has already been pointed out, under the heading, "The Scope of the Inquiry Herein," defendant cannot now question the sufficiency of the evidence to support the special finding that the delay complained of was due to its gross negligence.

However, under the present head of plaintiffs' argument, we refer incidentally to some of the evidence whereon the court based its finding of gross negligence.

The authorities are unanimous in denying to the stipulations on the message blank—no mat-

ter what their terms—the force of relieving the company from liability for the consequences of its own gross or wilful negligence or bad faith. To the general proposition it is almost unnecessary to cite cases, but reference may be had to a few of those relied upon herein by defendant.

For example, see

*Ellis v. American Tel. Co.*, 95 Mass. 226;

*Grinnell v. Western Union Tel. Co.*, 113 Mass. 299;

*Riley v. Western Union Tel. Co.*, 28 N. Y. Supp. 581.

The case of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, upon which defendant principally relies, itself contains a plain intimation that, where a finding of *gross* negligence is justified, no stipulation or other regulation can relieve the company from liability therefor. This court, in commenting upon the trivial character of the errors in transmission there complained of, declared that “a jury would not have been warranted in finding that it was *more than ordinary negligence*.” [154 U. S. 27.]

In the case at bar, however, we have a flagrant instance of gross negligence. *Three days’ delay* in the transmission and delivery of any telegram—particularly when its importance was

*apparent* on its face and was *fully explained to the company*—is negligence of so gross and inexcusable a kind as to remove the case from the sphere within which such stipulations are accorded any force of exemption. The ordinary prudent and reasonable man—whose supposititious conduct, under circumstances such as those presented in the case under consideration, is always the criterion of the degree of care or negligence displayed—would infallibly have exercised far greater diligence in a matter of such importance. A delay of three days, when the company was *fully advised* of the circumstances that made delivery within ten or eleven hours *absolutely indispensable*, and when it thereupon undertook, for an *additional* compensation, to effect an *immediate* delivery and evidenced its undertaking in that regard by writing the words, “deliver immediately,” on the face of the message—is either *gross* or *wilful* negligence—that is, it amounts to a *wanton disregard* of the rights of plaintiffs.

The Civil Code of California, sec. 2162, requires of a telegraph company “*great care and diligence* in the transmission and delivery of messages.” In *Western Union Tel. Co. v. Cook*, 61 Fed. 624, 629, (C. C. A., Ninth Circuit), it is held that no stipulation can have the effect of relieving it of its obligation to exercise that degree of care and diligence required of it by

this statute. (See, also, *Union Construction Co. v. Western Union Tel. Co.*, 163 Cal. 298.) Surely three days' delay is not the exercise of that "great diligence" required by the law's express provision. Only a *slight* degree of negligence—if one may differentiate between degrees of negligence—would be an absence of such "great care and diligence"; or, to put it in another way, any slight or ordinary lack of care when great care is exacted by express legislative enactment, is *gross* negligence. And as already seen, there can be no exemption from liability for gross or wilful negligence, or for bad faith. See most of the cases herein cited, and also

*White v. Western Union Tel. Co.*, 14  
Fed. 710;

*Hart v. Western Union Tel. Co.*, 66 Cal.  
579;

*Redington v. Pacific Postal Tel. Cable  
Co.*, 107 Cal. 317;

*United States Tel. Co. v. Gildersleve*, 29  
Md. 232, 96 Am. Dec. 519;

*Western Union Tel. Co. v. Longwill*, 5  
N. M. 308, 21 Pac. 339;

3 *Sutherland on Damages*, Sec. 296.

In *Hendershot v. Western Union Tel. Co.*,  
106 Ia. 529, 68 Am. St. Rep. 313, it was held  
that five hours' delay was negligence entitling  
plaintiff to recover. A delay of ten or twelve

hours in transmission, if unexplained, has been held to create the presumption of negligence. See, ~~also~~,

*Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192;

*Western Union Tel. Co. v. Clark*, 25 S. W. 990 (Tex. Civ. App.).

When there are special circumstances, very much less delay will raise the presumption of negligence. In *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540, 31 S. W. 825, a telegram was sent at midnight and was delivered at 9:30 a. m. It should have been delivered at 8:30 a. m., and this unnecessary delay of one hour was held to be negligence.

In the case of *Pierson v. Western Union Tel. Co.*, 150 N. C. 559, 64 S. E. 577, a night message was filed at 8 p. m. and was delivered between 9 and 10 a. m. the next day. It could have been delivered about 8 a. m. The addressee resided about 200 yards from the telegraph office. The court said: "That this is *gross* negligence is not open to discussion."

So, "a special undertaking to deliver without regard to office hours, in consideration of extra



payment, renders the company liable for failure to perform."

*Western Union Tel. Co. v. Perry*, 30

Tex. Civ. App. 243, 70 S. W. 439;

*Western Union Tel. Co. v. Cavin*, 30

Tex. Civ. App. 152, 70 S. W. 229;

*Western Union Tel. Co. v. Hill*, 26 S.

W. 252 (Tex. Civ. App.).

In view of the special circumstances that were fully disclosed to the company in the case at bar, and of the special undertaking on its part, in consideration of *extra* payment, to transmit and deliver immediately, there can be no doubt but that it was *grossly* negligent in not delivering the message, at the latest, very early on the morning of April 30th, 1907. The fact is that the telegram could readily have been delivered that morning—the day *after* it was sent—about *two hours before the bank received the draft*. In this connection will be recalled the testimony of defendant's agent who accepted the message for transmission. It was to the effect, as stated in the quotation above made from the opinion of the trial court herein, "that what was said to him about the importance of the message 'went in one ear and out the other; he did not pay any attention to it'." [Tr. pp. 163-164.] Comment would be superfluous, not only on this circumstance, but on the indifference displayed by defendant when inquiry was made at its Oakland

office respecting the fate of the message; its unwillingness to send out "tracers" except at plaintiffs' expense [Tr. p. 106]; its failure to make a prompt investigation of plaintiffs' claim herein—counsel's own statement at the trial being that "it had been allowed to lie dormant" for a year or two [Tr. p. 130]; its failure to send to Tonopah and Goldfield when advised that Quinn had said that the message had been erroneously sent to one or the other of those places [Tr. pp. 130-131]; and finally, its failure to produce the Wabuska operator or his deposition at the trial [Tr. pp. 129-130].

But counsel argue that, as "a very brief delay would have rendered the message useless," a delay for a greater period is not entitled to any evidentiary force on the question whether the negligence displayed is to be characterized as gross. (Petitioner's brief, p. 57.) We commend to the notice of the court counsel's notion of what constitutes "a very brief delay"! A delivery within eleven hours would certainly have sufficed for the message to accomplish its purpose. The message was accepted for transmission at 8:50 p. m. [Tr. p. 139.] By 9:30 p. m., it had arrived at Reno after traversing two relays and by far the greater part of the distance. [Tr. p. 70.] At 9:56 p. m., it was sent from Reno on the last relay on defendant's own lines and at the same moment it should

have been received at Wabuska, the terminus of defendant's line. [Tr. p. 120.] Even if the Yerington office was not open that night, nevertheless, it opened at 7 o'clock the following morning. The draft was not received by the bank until between 8:30 and 9 a. m. [Tr. p. 59], and the gold coin was not advanced thereon until later — some time "between the hours of opening and closing the bank's business on that day." [Tr. pp. 113, 59.] So that, if defendant had transmitted the message to Wabuska at 9:56 p. m. or at any time within ten hours thereafter, the loss would have been prevented. It is even probable that a delivery very much later in the day would have been in time to stop any advances by the bank on the faith of the draft. The bank did not open for business until 9:30 a. m. on April 30th. [Tr. p. 112.] While, as counsel state, the cashier of the bank testified on direct examination that the amount of the draft was credited immediately to Pitt and Campbell [Tr. p. 111], nevertheless on cross-examination he said that the bank did not credit Pitt and Campbell at all, but issued certificates of deposit to them "between the hours of opening and closing the bank's business on that day." [Tr. p. 113.] Hence, defendant had not less than two and one-half hours and possibly seven or eight hours after the Yerington telephone office opened,

within which to deliver a message over a telephone line eleven miles in length—this, of course, on the supposition that the message had been duly transmitted to Wabuska. Under the special circumstances of the case, any delay sufficient to render the message ineffectual to stop payment, if unexplained—and there was no explanation vouchsafed by defendant,—necessarily constituted negligence so culpable as to constitute reckless indifference equivalent to wilfulness.

But however such a delay as would have been *barely sufficient* to produce the injury, is properly to be characterized, certain it is that the fact of the occurrence of additional delay has the highest probative value on the attitude displayed by defendant in this whole transaction. Not that the added delay produces the injury, but that it throws light upon the state of mind that *was* productive of that injury.

#### IV.

**The Pitt and Campbell Contract Left It to Plaintiff's Option to Withhold the May 1st Installment and Thereby Forfeit the Previous Payment and Terminate "All Rights of Each of the Parties Thereunder."**

Obviously, if plaintiffs had the right, under their contract with Pitt and Campbell, to withdraw from the transaction and terminate their

liability by defaulting in the payment of any installment therein mentioned, defendant's delay in transmitting and delivering the message whereby they sought to exercise this right and prevent the payment of their draft, caused them to suffer a detriment that they would otherwise have escaped.

Plaintiffs' right of withdrawal depends upon the construction of the Pitt and Campbell contract. The construction of any contract is a matter of determining the intention of the parties thereto; and if, in a contract such as that here presented, the intent is displayed to leave further performance by plaintiffs to their option, there is no rule of law prohibiting the giving effect thereto.

By the contract in question Pitt and Campbell agreed "to sell and deliver," and plaintiffs agreed to "buy, take and receive," the mining stock—not absolutely,—but "*upon the following terms AND CONDITIONS, to-wit:*

"First: The total price or sum to be paid for the said shares of stock is \$75,000.00 *in gold coin* \* \* \* payable in the following manner [here are specified the installments with their respective dates of payment];

"Second: It is hereby agreed by [Pitt and Campbell] that immediately upon the payment of [the initial installment], they will deposit in escrow in and with the Lyon County Bank, \* \* \* certificates of stock \* \* \* endorsed *in blank* \* \* \* and representing in the aggregate [the number of shares constituting the subject-

matter of the contract], and will thereupon enter into an escrow agreement with [plaintiffs] and said \* \* \* bank, under which said \* \* \* bank shall hold said shares \* \* \*, to be delivered to [plaintiffs] immediately upon the payment by [plaintiffs] of the final payment \* \* \*.

“Third: And it is further agreed that in the event of default by [plaintiffs] in making any of the payments herein provided for, said Lyon County Bank *shall be authorized under the terms of such deposit in escrow*, AND IT IS HEREBY AUTHORIZED, *to deliver all of the shares of stock* so deposited with it pursuant hereto to [Pitt and Campbell], and that all payments theretofore made by [plaintiffs] shall be forfeited to [Pitt and Campbell], *and that thereupon all rights of EACH of the said parties hereunder shall* FOREVER CEASE AND DETERMINE.”

[Tr. pp. 45-46.]

Considering the terms of this contract as a whole, it is plain that there was no *absolute* sale of the stock, nor any *absolute* obligation on the part of plaintiffs. The certificates were delivered only *in escrow* and were endorsed only *in blank*. By its express terms, on a default in payment there was *automatically* effected a *return of the stock* to Pitt and Campbell. Having preliminarily *elected* (so to speak) to take back their stock on a default by plaintiffs in making payment, Pitt and Campbell were surely never in a position, by making a *different* election, to substitute another contract for the one entered into by plaintiffs. To keep the contract alive and in force so that the rights then exist-

ing under it should ripen into an actual sale and transfer of title, plaintiffs were, from time to time, to pay certain installments of the total price named. The results flowing from a default in this regard are *expressly* defined by the contract, and one of those results is stated to be that "ALL *rights of EACH of the parties hereunder shall forever cease and determine.*" That being so, there is no room for construing the provision respecting default as one to be taken advantage of *only by the vendors, at their option*; for the terms employed are contradictory of any such interpretation.

If, in case of default, the vendors had the right to enforce payment of further installments, such right existed only by reason of the contract, *i. e.*, it was *one* of the rights of Pitt and Campbell thereunder. But a default in payment is expressly given the force of causing "*all of the rights of EACH of the parties,*" *i. e.*, the rights of Pitt and Campbell as well as those of plaintiffs, to "*forever cease and determine.*" The court cannot construe *any* right as subsisting in either party after a default in payment, without substituting another contract for the one in question. The effect of a default having been expressed in terms *excluding* any idea that the same would follow *only at the option* of Pitt and Campbell, no terms giving a different effect to such default can be imported or con-

strued into the contract. *Expressum facit cessare tacitum*. To hold otherwise would be to say that though the contract expressly provided for the termination of *all* rights of Pitt and Campbell, yet the only right they could *possibly* have thereafter was none the less still in existence. They had no choice, under their contract with plaintiffs, and under the deposit in escrow, but to take back their stock on any default—having in such event “*authorized*” its return by the bank to themselves at the very incipiency of the transaction. Surely the law does not countenance a construction so opposed to good sense as to require, in effect, the striking out from the contract of the provision that, upon default in payment, “*all rights of each of the parties hereunder shall forever cease and determine.*”

A case precisely in point is that of *Ramsey v. West*, 31 Mo. App. 676. The court there had under consideration the effect of a forfeiture clause in an agreement whereby it was recited that “in consideration of the sum of \$20,000, *to be paid* as hereinafter specified, the receipt of \$5 of which is hereby acknowledged, the said John S. West *has this day sold* in fee simple to S. C. Schaeffer” certain described lands. “And the said S. C. Schaeffer, for himself and assigns, *agrees*, subject to the *condition* hereinafter named, *to pay* the said sum” in install-



ments therein stipulated. The contract further provided that, on receipt of the first installment, West would deliver to Schaeffer a deed for the premises, and that at the same time Schaeffer would deliver to West notes for the deferred payments, secured by a mortgage. The contract contained the following forfeiture clause:

"It is understood that if the said Schaeffer \* \* \* shall neglect or fail to pay \* \* \* the first payment of \$5000.00 on or before the time stipulated, then this agreement to be wholly void and shall *cease to be binding on EITHER of the parties hereto.*"

Schaeffer, having failed to make the first payment, afterwards refused to carry out the contract and complete the purchase. The lower court held that he was obligated to purchase the land and that the forfeiture clause was one that could be invoked or not solely at the election of West. In reversing this judgment, the appellate court said:

"The condition of the contract with which it concludes *in express words is made for the benefit of both the parties thereto.* While the principle invoked by the plaintiff's counsel, 'it is a far-reaching principle of common law that a party shall not be allowed to take advantage of his own wrong, and courts will not so construe the contract as to enable the party committing the wrong to take advantage of it,' is a sound principle and firmly established, it has no application to a contract *whose language gives no reason for construction, and*

*is susceptible of only one meaning, and that meaning is that the party failing to comply with one of the terms of the contract may, as well as the other party, on the happening of the failure, elect to put an end to the contract. Because, although the principle of construction should be given full force, it cannot authorize the court to make a new and distinct and different contract for the parties. The contract in this case clearly provides that Schaeffer, upon failing to pay or tender the first payment provided for thereby, might elect to treat the contract as at an end, for the words are, 'then this agreement to be wholly void, and shall cease to be binding on either of the parties hereto.' On no ground can we refuse to give the force, effect, and meaning to these words which they plainly intend."*

31 Mo. App. 684.

On rehearing the court cites the case of *Bradford v. Limpus*, 10 Ia. 35, in support of its conclusion that the contract was an optional one, and says of the same line of authorities cited by counsel for defendant herein (including *Wilcoxson v. Stitt*, 65 Cal. 596, and *Mason v. Caldwell*, 5 Gilm. 196) that "they do not apply to this contract. \* \* \* If the words used in the contract do not convey the meaning given them by us, *it would be difficult to conceive words that would do so.*"

It will be noted that in this case the contract recited that the vendor "*has this day sold*" for a purchase price "*to be paid,*" and that the vendee

"agrees to pay," and to execute and deliver notes for the deferred installments at the time of the first payment. In the case at bar, we have an agreement by Pitt and Campbell to "sell and deliver," and an agreement by plaintiff "to buy, take and receive"—but these agreements are both explicitly declared to be "upon CONDITIONS." Hence the idea of an *absolute* obligation on the part of plaintiffs to purchase is expressly negatived—and particularly so when we consider the peculiar terms authorizing the depository in escrow to return the stock and the unambiguous wording of the forfeiture clause.

A circumstance lending weight to this view is that at no point in the contract do plaintiffs *explicitly agree to pay* anything. The price "to be paid" is recited, but the only further recital is that it "shall be payable" in installments. While the absence of an express promise to pay might not relieve the vendee of his obligation to purchase if there were no forfeiture clause such as is here under consideration, nevertheless that absence is cumulative evidence of an intent to make the forfeiture clause available to both of the parties to the contract.

See, also, *Beckwith-Anderson Land Co. v. Allison*, 26 Cal. App. 473, where a contract for the sale of land provided that the vendee should make payment of a cash installment when the

agreement was executed, of a further sum on the delivery of the deed, and of the balance in three annual installments. The contract further provided that upon the failure of the vendee to pay the first installment, the vendor should be released from all obligations to convey, and *all rights of the vendee should cease*, and the cash payment should be "forfeited as damages for the non-fulfillment of the conditions hereof" by the vendee. The court, after observing that "it was \* \* \* *unconditionally* provided that upon the failure of [the vendee] to comply with the conditions to be performed by him," the forfeiture should result, *added*:

"Under such circumstances the proposed purchaser has an *option* to purchase, *without any obligation* beyond the fact that he is subject to the loss of his forfeit money if he does not complete the transaction."

26 Cal. App. 475-476.

In *Ferstine v. Yeane*, 210 Pa. 109, 59 Atl. 689, the court had under consideration a contract by which Yeane agreed to sell and convey certain land to Stamey & Co. for a price payable one-half in six months from the date of the agreement, the balance in two equal annual installments; "and it is agreed that in case the said W. H. Stamey & Co. does not make the payment within the limits of the time specified \* \* \* then this agreement to be null and void

and *all parties* to be released from *all liability* herein." The court said:

"The agreement is *practically an option*, and was so regarded below. It is true it is an unconditional covenant on the part of Yeanev to convey, and there is an *agreement* on the part of Stamey & Co. to pay, but their agreement has attached to it—doubtless at their instance—a *proviso* that, if they do not make the payments at the time stipulated, they are to be *released from all liability*. The agreement in *Yerkes v. Richards*, 153 Pa. 646, 26 Atl. 221, 34 Am. St. Rep. 721, was substantially the same, and the condition as to failure to make payment similar. We declared it to be an option. Here Stamey & Co. never exercised their option by paying the first installment when it became due, and by *their voluntary default elected to say they would not take the property.*"

59 Atl. 690.

The terminology which the parties employ in their contract—while of importance in determining the nature thereof—does not in any case require a violation of the obvious intent with which it was used, even though more apt terms might be suggested for the expression of that intent. For example, see *Pittsburg, etc., Brick Co. v. Bailey*, 76 Kan. 42, 90 Pac. 803, where, though a contract was designated a *lease* and contained terms of demise, nevertheless it was by the court regarded as a mere *option* by reason of its containing a clause permitting the so-

called lessee to surrender the same, and a further clause to the effect that the failure to complete a certain oil well, or to make payment, would render the contract void after a lapse of two years. See, also, the case of *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535, where the court held to be "a mere option" an agreement by landowners to sell which contained a clause to the effect that, if the consideration was not paid within the time stipulated, "this contract shall be null and void."

A case closely in point is that of *Williamson v. Hill*, 154 Mass. 117, 27 N. E. 1008. We quote the syllabus in the latter report, as follows:

"Plaintiff sold defendant certain patent rights in consideration of annual payments which were to aggregate \$250,000, upon condition that should any such annual payment become due, and should default in payment be made sixty days after demand, the contract should be null and void. It was stipulated that a single payment of \$100,000 might be made in lieu of the annual payments, and that defendant might assign his rights under the contract, the same conditions to be binding on the assignee. *Held*, that the contract was terminable for the benefit of defendant as well as of plaintiff, and, where default has been made in payment, it cannot be recovered by suit, as the contract is then avoided for all purposes."

27 N. E. 1008.

In the case at bar, the clause "*all rights of EACH of the parties hereunder shall forever cease and determine,*" can only mean the rights of the vendors as well as of the purchasers. To give it any other meaning, requires the court to read *out* of the contract the words "*each of the parties*" and to read *into* it the wholly contradictory expression, "*the parties of the second part*" [plaintiffs]. The present is a much stronger case in this regard than *Williamson v. Hill, supra*, and is not distinguishable from *Ramsey v. West, supra*, nor, on principle, from *Gordon v. Swan*, 43 Cal. 564, *q. v.*

It is clear, therefore, that no absolute sale of the stock was made. By the contract's own terms, the sale and purchase were declared to be "*upon \* \* \* conditions*"; and one of those "*conditions*" was that upon default by plaintiffs in paying any installment "*all rights of EACH of said parties hereunder shall forever cease and determine.*" It is impossible to suggest language that would point more unmistakably to the intention that, upon default, there should be effected *automatically*—that is, by the *terms* of the contract *itself*, and not by the *election* of the vendors—a wiping out of *all* rights secured thereunder to both parties. In precise phrase the contract defined the sole rights existing in case of default and the very steps to be then taken by the depositary in escrow, and ex-

pressly declared the non-existence of any other rights whatsoever.

A forfeiture is not favored by the law; and a forfeiture that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor, since it gives that party the further advantage (beyond such as is accorded by a simple forfeiture) of an election on his part to enforce either further performance or the forfeiture—accordingly as the one or the other may seem, at the time, to be the more profitable to him and, therefore, the more onerous on the other party. But where the forfeiture provided for is, in a manner of speaking, *compensated for* by having annexed to it the effect of wiping out all further rights and liabilities under the contract, there is less reason for viewing it askance. In other words, the party forfeiting gets some value for the money forfeited; whereas in the case of a forfeiture that may be exacted at the election of the other party, either the forfeiture is invoked (in which event he loses his money), or the performance of the contract is enforced (in which event he may stand to lose more)—and this without his being able, in most cases, to foresee what will be the result of his defaulting.

A purchaser may very well prefer to lose what he has already paid on a contract rather



than go on under it; and it is certain that he will always, if possible, so draft his contract that default in payment will terminate further liability. On the other hand, the vendor will always seek to frame the contract in terms giving himself the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. (*Glock v. Howard, etc., Co.*, 123 Cal. 1.) Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of *each* of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision. The only other possible intent embraced within the meaning of the words here actually employed is that the forfeiture should be worked *by the terms of the contract itself*—not by the election of the vendor—the vendor yielding a point that, in the absence of the special stipulation, would have been his, and the purchaser gaining what would otherwise have been denied him. In other words, the forfeiture has some element of mutuality and is, therefore, not so abhorrent as is the ordinary forfeiture for lack of that quality.

The construction here contended for is not only reasonable, but it is the only construction

that gives their plain meaning, or any force whatever, to the words "thereupon" (*i. e.*, upon default in payment) "*all rights of each of said parties hereunder shall forever cease and determine.*" This construction is the only one that would even suggest itself to the layman. Both parties to the contract acted upon it as the only tenable one—plaintiffs sending their telegram in reliance upon its correctness and explaining to the telegraph company that they had the right to terminate the contract by withholding payment; and Pitt and Campbell taking back their stock (as we shall see) without even suggesting that they had any claim against plaintiffs for the unpaid balance of \$55,000.

If our interpretation be a reasonable one and the only one giving any force to the words declaring that upon default "*all rights of each of said parties hereunder shall forever cease and determine,*" it must be given to them unless some rule of law forbids or invalidates stipulations of this nature; and it will hardly be pretended that any such rule exists. That defendant's contention is without merit must be apparent if we but ask ourselves: "What right of Pitt and Campbell was to cease and determine upon the default *except* it be the right they might otherwise have had *to enforce further payment?*" There could be no other possible right in the vendors; for the contract and the

escrow thereunder expressly secured to them the *right* to the return—not to say *actual return*—of their stock, and the *right* to the forfeiture, and the *actual forfeiture*, of all moneys previously paid. It was their *only remaining right*—to enforce further payment by plaintiffs—that the contract expressly declares to be non-existent after a default.

In 2 *Warvelle on Vendors*, p. 818, it is said:

“But forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture, he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, \* \* \* The right to declare a forfeiture is derived from the stipulation of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee to comply with its terms may elect to declare the contract at an end.”

The author, after recognizing cases of the class of *Wilcoxson v. Stitt*, 65 Cal. 596, proceeds as follows:

“But while forfeiture, as a general rule, is a privilege of the vendor, to be exercised or not at his option, and the vendee is debarred from treating the contract as rescinded merely by a surrender of possession and a waiver of any further rights in the money previously paid by way of earnest or upon installments, yet the *wording* of the agreement relating to forfeiture may

under some circumstances *be construed to create mutual covenants that will extend this privilege to the vendee as well*. Cases of this kind are not difficult to imagine, and the books furnish us with precedents on which to base the rule. Thus, where by the terms of the agreement it is stipulated that upon failure to make payments as agreed, or if such failure continue for a specified time thereafter, all payments theretofore made should be forfeited, and the agreement shall thereafter be null and void, if default occur the contract, by its terms, comes to an end at the time limited. [Citing *Streeper v. Williams*, 48 Pa. St. 450.] A contract so worded has been held to create mutual covenants—the vendee in case of default agreeing to forfeit all moneys previously paid, and the vendor agreeing that thereafter the contract shall cease; or, in other words, in consideration of the vendee's agreement to forfeit the money which he shall have paid, the vendor agrees to accept that in full satisfaction of the agreement, and to release and discharge the vendee from all subsequent liability thereon." [Citing *Neill v. Peale*, 4 Atl. 830, Pa.]

*2 Warvelle on Vendors*, p. 821.

It is submitted that the case at bar is precisely in the category of those discussed in the foregoing quotation from Warvelle.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson v. Stitt*, *supra* (city realty); but is one where the investment was of the

same hazardous nature as in *Gordon v. Swan*, *supra*, (a mine) and in *Williamson v. Hill*, *supra*, (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional installment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability.

In the western states, where mining is one of the chief industries, contracts are frequently met with for the purchase of mines or mining stocks on conditions very similar in form to those under discussion. The deeds or certificates are in each instance placed in escrow to await the issue of the transaction. An immediate or early payment of a more or less substantial sum is made, and it is provided that the balance shall be paid in installments at stipulated times. The aggregate of these installments, *i. e.*, the total purchase price, is usually very large, and bears relation rather to the optimistic estimate of the owner than to the visible worth of the property at the date of the contract. The prospective purchaser is willing to enter into such a contract because he reckons on paying the total price only in case the mine, on development or adequate prospecting, justifies the sanguine expectations of the

owner; and he has the interval between any two payments within which to determine, from such current development as may have a bearing on the value of the contemplated investment, whether he will keep alive his option or conditional contract of purchase by paying the next installment. If the mine turns out well, he pays an adequate consideration therefor. If it does not, he defaults in the payment of an installment; his forfeiture compensates for the privilege he has enjoyed; and the property is handed back to the vendor, to whom no injury results, since he not only retains the property he started with (and usually the improvements made by the prospective purchaser) but also all moneys paid on account prior to the default. It is plain, therefore, that there is no unfairness in construing such contracts in the manner here contended for, and as the Supreme Court of California construed a similar one in *Gordon v. Swan*, *supra*. Moreover, to adopt any other construction would be equivalent to prohibiting the investment in most mines of that capital without which their wealth must forever remain unavailable.

We submit, therefore, that plaintiffs had the right, *either* to keep the Pitt and Campbell contract alive by paying the installments from time to time as therein provided, and thereby finally to become absolutely entitled to the stock, *or* to

default in payment at any time and thus “forever” terminate “all rights of EACH of the parties” to the contract.

Counsel contend that the words of the contract—“*thereupon* all rights \* \* \* shall cease”—do not relate to the default in payment, but to the return of the stock. [Petitioner’s brief, pp. 64-65.] From this premise they reduce our construction of the contract to the absurdity of denying to Pitt and Campbell, upon plaintiff’s default, even the right to the return of their stock, for the reason that such right was one that *thereupon* ceased. The difficulty that counsel seek to create in this respect grows out of a failure to differentiate between the reciprocal rights of plaintiffs and of Pitt and Campbell on the one hand, and the distinct rights secured, respectively, to Pitt and Campbell and to the bank on the other.

The default in payment gave instant rise to the duty of the bank to return the stock to Pitt and Campbell and contemporaneously forfeited past payments to them. But it is not to be lost sight of that the *bank’s* duty in this regard arose *only under the terms of the deposit in escrow*—not under the Pitt and Campbell contract, to which the bank was not a party. True, the latter contract provided precisely what the terms of the escrow should be, and the oral escrow agreement and instructions followed the

pertinent provisions thereof. But they were distinct agreements, to the latter of which only was the bank a party. Therefore, in the use in the Pitt and Campbell contract of the phrase, "*thereupon* all rights of each of said parties hereunder shall forever cease and determine,"—we find nothing upon which counsel can base their attempted *reductio ad absurdum*. As between the parties thereto, *i. e.*, plaintiffs and Pitt and Campbell, all rights of *each*—of the former to purchase and of the latter to sell—ceased upon and by reason of the contemporaneous default and forfeiture. These were rights "*hereunder*." But the duty of the bank still subsisted under the oral escrow agreement. As depositary in escrow, the bank was the trustee of an express trust invested with duties the performance of which neither of the parties to the agreement for the deposit could forbid. (*Manning v. Foster*, 49 Wash. 541, 18 L. R. A. [N. S.] 337; *Cannon v. Handley*, 72 Cal. 133.) Moreover, Pitt and Campbell's right to the stock, *i. e.*, their ownership, did not *arise* under the contract, and it still subsisted though that contract was wiped out.

If the adverb "*thereupon*" refers to the moment of the return of the stock (as counsel argue) rather than to the moment of default in payment, then the adverb "*theretofore*," used in an identical construction in the phrase "all pay-



ments *theretofore* made shall be forfeited," must likewise refer to the moment of such return. This would entail the forfeiture of all moneys that might have come into the bank's hands even after the date on which a default had been made—an intent that cannot be attributed to either of the parties. For example, if plaintiffs made a payment on a day later than that on which it was required to be made under the contract, Pitt and Campbell could then, under counsel's view, elect to take back their stock and forfeit all payments *theretofore* made, *i. e.*, prior to the return of the stock, thus embracing in the forfeiture the very payment delay in making which constituted the default. Such an inequitable construction could not possibly be sustained, and to avoid it the word "theretofore" would be held to refer to the moment of default. Accordingly, the adverb "thereupon" must be held likewise to refer to the same moment.

In this connection, note that the word "thereupon" does not occur in the phrase providing for the forfeiture of all moneys paid by plaintiffs. If counsel's contention is correct, the right to the forfeiture could only arise upon the physical repossession of the stock by Pitt and Campbell. The contract, however, is explicit that a forfeiture occurs upon the mere default, and necessarily the determination of all rights

must take place at the same moment, since it is impossible to conceive of the parties agreeing that prior payments shall be forfeited and yet that plaintiff's liabilities for future installments shall be kept alive until Pitt and Campbell actually receive from the bank the physical redelivery of the stock.

The pertinent clause of the Pitt and Campbell contract is very different in its provisions from what counsel's purported synopsis of it would lead one to expect. [Petitioner's brief, p. 11.] Somewhat to counsel, the contract provides: "that in the event of any default in payment the bank *shall* be authorized to return the stock." If this were true, it might possibly follow that the bank's authority was to arise in the future after default had been made, and was to be given by the vendor alone. The points of difference between the actual contract and counsel's synopsis are obvious, and are conclusively in favour of our construction. They are as follows: (a) The authority to return the stock is to be given "under the terms of the deposit in escrow" long *before* a default could possibly occur; (b) as between themselves, the parties to the contract unite in presently confirming that authority in this very instrument *before* even any escrow agreement was entered into; and (c) it is agreed that default in payment shall be the contingency in which that au-

authority shall be *exercised* by the bank—not as agent of either party, but as trustee of *both*. In view of these circumstances, how can it be said that *one* of those parties might vary the terms of the trust by forbidding the bank to do what both parties *preliminarily agreed* that the bank had authority to do in event of any default in payment?

Counsel seek to make some capital out of the fact that "the bank was not *directed* nor *compelled* to return the stock upon default in payment; it was only given *authority* to do so." [Petitioner's brief, p. 64.] When one person simply confers authority upon another to do an act for him, of course the principal (except in the case of a power coupled with an interest) can revoke the authority. But a depositary in escrow is not a mere agent; he is the *trustee of an express trust* with duties prescribed in advance by the escrow agreement, to which alone can he have recourse for his sailing instructions. If the two *cestuis que trustent* unit in an agreement that, in a certain event, the depositary "shall be authorized, and he is *hereby authorized*," to pursue a definite line of conduct, and thereupon make the deposit in escrow under instructions so "authorizing" the depositary, neither *cestui* can revoke those instructions. (16 Cyc. 568.) The very essence of an escrow is that it is "beyond the control of the grantor for

all time." (*Id.*) What is thereafter to be done with it depends—not upon the will or election of either of the parties—but upon the happening of the contingencies provided for in the escrow instructions. A deposit subject to the subsequent instructions of the grantor is no escrow at all. Yet it cannot be doubted but that there existed an escrow in the case at bar.

It will not escape the court's attention that, at the date of the trial herein, any action on the contract by Pitt and Campbell against these plaintiffs had long since been barred by the statute of limitations. This circumstance bears a double aspect. Not only was it then impossible for Pitt and Campbell to maintain any action thereon, but their permitting the statutory period to run without seeking redress against plaintiffs indicates either an election to take back their stock or complete acquiescence on their part in the construction placed upon the instrument by plaintiffs, when they determined to abandon the contract by withholding payment. In *Mitau v. Roddan*, 149 Cal. 1, the court found it unnecessary to construe the contract before it, because of the practical construction placed thereon by the parties, "which," said the court, "is *controlling*" and "which renders it immaterial to consider what might be the literal construction of its terms." The court proceeds:

"It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is *alert to his own interests, and to insistence on his rights*, and that whatever is done by the parties contemporaneously with the execution [*i. e.*, the performance] of the contract is done under its terms as they understood and intended it should be. \* \* \* The law, \* \* \* recognizes the practical construction of a contract as the *best evidence* of what was intended by its provisions. \* \* \* in any subsequent litigation which involves the construction of the contract, [the law] adopts the practical construction of the parties as the true construction and as the *safest* rule to be applied in the solution of the difficulty."

149 Cal. 14-15.

We do not notice counsel's suggestion, at page 85 of their brief, that the "vendor could not escape obligation to convey by failing to convey," further than to say that a contract which *neither* party is bound to perform is no contract at all, and that their supposititious case is not analogous to the one at bar. It is of the essence of any option that one party is bound and one is free. Here the obligation existed on the part of Pitt and Campbell to transfer the stock if plaintiffs elected to pay, and did pay, all of the installments. In fact, the deposit in escrow puts this matter, both legally and physically, beyond the control of the vendors.

(a) DISTINCTION BETWEEN THE FORFEITURE  
CLAUSE OF THE PITT AND CAMPBELL CON-  
TRACT AND THE CLAUSES INVOLVED IN THE  
CASES CITED BY DEFENDANT.

Counsel cite in this connection only those cases "which provide that upon such default [in payment] all the rights of the parties shall cease or such contract be void and of no effect." [Petitioner's brief, p. 70.] They are of no force herein because they merely enunciate the general rule as to forfeiture clauses, leaving untouched our contention that the terms of the present contract preclude its application.

The fact is that the words—"all rights of *each* of the parties hereunder *shall forever cease and determine*"—taken in their context, furnish the very degree of clarity, precision and certainty that the law requires in a forfeiture clause before considering it as intended for the benefit of *both* parties to the contract. They indicate *unmistakably* an intent that the clause shall be self-operating; and particularly must this be apparent when it is considered that the earlier portion of the paragraph in which they occur, by ordaining the future course of a *depository in escrow*, renders it impossible for either party to have any right of election.

On the other hand, the expression,—"*the contract shall be void*,"—is equivocal, ambiguous, and therefore open to construction. "*Void*" is

frequently—nay, almost universally,—held to mean “voidable”; and when it occurs in a forfeiture clause where the contingency is default in payment, it is always so held in order not to impute to the parties the unusual intent that one of them may take advantage of his own default. The cases cited by counsel are all of this class; and yet they all recognize (as does the opinion herein of the trial court [Tr., p. 160-161]) *that there is no rule of law forbidding parties so to contract that the one defaulting may thereby bring the contract to an end for all purposes, provided apt and unambiguous words be used for that purpose.* Here plaintiffs have employed such apt terms.

In the case of *Cape May Real Estate Co. v. Henderson*, 231 Pa. 82, 79 Atl. 982, <sup>*cited by defendant,*</sup> the court in applying the general rule to the forfeiture clause there in question, says:

“There is no covenant that the defendant should by his default be released from his obligation to pay, *nor that the rights of the grantor under the contract should cease.*”

79 Atl. 983.

The italicized words which the court failed to find in that case are present in the Pitt and Campbell contract in practical identity. In the clause “thereupon all rights of EACH of the parties hereunder shall forever *cease* and deter-

mine," there is no lack of precision, no ambiguity, nothing susceptible of construction. The only default mentioned in the contract is default in payment by plaintiffs. Both parties to the contract are separately mentioned in the selfsame paragraph in which this clause occurs. And yet in the face of this, the contract is particular to define the rights that are, upon such default, to cease and determine forever as "all rights of *each* of the parties hereunder."

We attach some importance to the expression, "shall *forever cease and determine.*" There is a sense of finality therein that is absent from any such clause as, "the contract shall be *void.*" "*To cease*" is "*to come to an end.*" "*To determine*" carries the idea of cessation a little farther, and means,—"*to reach a set limit or termination; to cease to be; hence, to lose binding force.*" A "*limit*" is "*a line, point or boundary beyond which whatever is bounded ceases to extend, avail, operate, etc.*" "*Termination*" is defined as "*a limit in point of time; an end of continuance or duration; close; end.*" A "*set*" limit or termination is one "*established by authority or agreement; prescribed; ordained; appointed.*" (Standard Dictionary.) The adverb "*forever*" emphasizes this finality. It means "*throughout eternity,*" or in the present context, to be more exact, it means "*thenceforth throughout eternity.*" Can a limit or termina-



tion of rights be said to be "set," when after the happening of the contingency on which it depends, it may be declared by one of the parties, at his whim, to constitute *no* termination of *his* rights?

The case of *Wilcoxson v. Stitt*, 65 Cal. 596, cited by counsel, is clearly distinguishable. That was a case of an agreement for the sale of land wherein the purchaser paid one-half of the price and agreed to pay the balance by a certain day. It was provided that "in the event of failure to comply with the terms and all the conditions hereof by the [purchaser, the vendor] shall be released from all obligations \* \* \* to convey said property \* \* \* and the [*purchaser*] shall forfeit all right thereto, and this agreement shall be *void*"—after which followed a provision whereby the vendor, "on receiving such payments, at the time and in the manner above mentioned," obligated himself to convey. The vendor, on default in payment, sued to recover the balance mentioned. This action was sustained, the court holding that the provision as to default gave the vendor the option either to avoid or to enforce the contract.

It will be noted that in the *Wilcoxson* case, the terms of the contract expressly released the *vendor*, on the purchaser's default, from the obligation to convey and forfeited the latter's

right to the property. It was natural, therefore, to read the further provision—that “this agreement shall be *void*,”—in the light of those particular stipulations and to hold that it really meant “*voidable*” by the party whose obligations in the premises were released by the other’s default. By so construing the contract, every portion of it would, in conformity to the elementary rule, be given some effect; whereas, if the clause,—“this agreement shall be void,”—were construed literally, the clauses releasing the vendor from the obligation to convey and forfeiting the purchaser’s right to compel a conveyance, would be rendered superfluous and of no effect whatever, in that the same ground would have been covered by the clause avoiding the agreement. And it is common learning that the word “void” is frequently used, where the term “voidable” would be the exact expression of the idea it is intended to convey.

The case of *Stewart v. Griffith*, 217 U. S. 323, is in the same category as *Wilcoxson v. Stitt*, *supra*. The opinion therein is based wholly upon the *indicia*, contained in the contract, of an absolute obligation upon the purchaser’s part to take the land and pay the price therefor. The court says:

“But in this case we are not confined to a mere implication of a promise from the penalty. The tenor of the ‘agreement’

throughout imports mutual undertakings. The \$500.00 is paid as 'part purchase price of the total sum *to be paid*;' that is, that the purchaser agrees to pay. The land is described as '*being sold*.' There are *words of present conveyance*, inoperative as such, but implying a concluded bargain, like the word 'sold' just quoted. So one-half of the purchase price 'is to be' divided and the notes secured by mortgage '*to be given*;' and in the case of the burial lot, Ball [the vendor] '*shall have paid to him*' \$40.00 if he elects to abandon it. Here is <sup>an</sup> absolute promise in terms, which it would be unreasonable to make except on the footing of a *similar promise* as to the main parcel that the purchaser desired to get. We are satisfied that Stewart [the purchaser] bound himself to take the land. \* \* \* This being so, the word 'void' means voidable at the vendor's election, and the conditions may be insisted upon or waived at his choice."

217 U. S. 327.

The same may be said of each of the cases cited by petitioner at page 79 of its brief. None of them is distinguishable on principle from *Wilcoxson v. Stitt*, *supra*, or *Stewart v. Griffith*, *supra*, and it is therefore unnecessary to note such variance as there may be in the terms of the several contracts therein under consideration. In some of them, however, the *indicia* of an absolute obligation on the part of the purchaser are more pronounced than in the cases last cited. Thus, in *McMillen v. Strange*, 159 Wis. 271, in addition to an absolute promise

to pay the purchase price of the stock which was the subject-matter of the contract, there were provisions for the giving of security therefor, for the immediate execution of an assignment of the stock to the purchaser, for the payment of interim dividends to him, and for the giving of irrevocable proxies enabling the purchaser to vote the stock during the period of the escrow thereof provided for by the contract.

The case at bar is much more like the case of *Gordon v. Swan*, 43 Cal. 564, and *Williamson v. Hill*, 154 Mass. 117, 27 N. E. 1008, and is indistinguishable on principle from the cases cited herein in support of plaintiffs' construction, particularly the case of *Ramsey v. West*, 31 Mo. App. 676.

It is plain that the provision as to default in payment was inserted for the very purpose of allowing plaintiffs to withdraw from a hazardous investment at any time, and by so withdrawing, to free themselves from all possibility of loss beyond what they had already paid the vendors. If, by defendant's gross negligence, plaintiffs were hindered from taking advantage of a condition of the Pitt and Campbell contract of which they desired to avail themselves, they are entitled to recover the amount of the benefit they would have obtained if they had not been so hindered. (*Gray on Communica-*

tions by Telegraph, Sec. 82.) That benefit was the saving of \$11,250, which, as is found, would not have been paid to Pitt and Campbell, but for defendant's failure to deliver the telegram as *specially agreed* in consideration of the payment of an *extra compensation*.

V.

**The Finding That Plaintiffs Made No Further Payment Under the Pitt and Campbell Contract, but Abandoned It and Forfeited All Moneys Paid Thereon, Constitutes a Finding That Pitt and Campbell Exercised Their Right of Election (If Any) in Favor of the Forfeiture.**

The court found:

"That plaintiffs did not make any further payments on the purchase price of said shares of stock \* \* \* but abandoned said contract with said Pitt and said Campbell and forfeited and lost all moneys paid thereon." [Finding XVII, Tr., p. 60.]

Also:

"that by reason of defendants' gross negligence in failing to transmit and deliver said message immediately \* \* \* plaintiffs suffered damage and loss in the amount of the value of said draft." [Finding XX, Tr., p. 61.]

There was evidence in the case which would have sustained an explicit finding that Pitt and Campbell had elected to take back their

stock on plaintiffs' default. But apart from that, if, as a matter of fact, plaintiffs made *no* further payments but *abandoned* the contract and *forfeited* all moneys paid thereon, then Pitt and Campbell *must necessarily* have elected to take back their stock (assuming they had any option at all). The ultimate fact was the forfeiture; the probative facts were the default in payment and such election to retake the stock, and, of course, the ultimate fact only need be found. Accordingly, although counsel's contention that there was "no evidence that the stock had ever been returned to Pitt and Campbell, or that they had ever demanded its return" [Petitioner's Brief, p. 66], cannot be presented on the record herein, it would not be sustainable even if the argument were directed against the sufficiency of the findings.

Surely defendant is controlled herein by what Pitt and Campbell *actually* did—assuming that they had any election,—and not by what they *might* have done, but did not in fact do. When they worked the forfeiture of the moneys already paid, plaintiffs suffered as much by defendants' negligence as though they had had (in conformity to our contention) the absolute right to withdraw from the contract.

Though the fact that the stock *was* returned to Pitt and Campbell, is necessarily involved in the finding of the abandonment and forfeiture,

plaintiffs are really not concerned with what happened *as between the bank and the vendors*,—the important points being that further payments were *not* made by them, and that they *abandoned* the contract and suffered a *forfeiture*,—all of which is covered by both evidence and findings.

But even though there were no such finding of forfeiture, if Pitt and Campbell could have elected under the contract either to work a forfeiture or to enforce further payment by plaintiffs, the judgment rendered in plaintiffs' favor is nevertheless proper, in view of defendant's failure to show, as an affirmative defense, that such election in fact was made in favor of the enforcement of payment. In *Vito v. Birkel*, 209 Pa. 206, 58 Atl. 127, it is held that, under the ordinary forfeiture clause, no affirmative election by the vendor to forfeit the contract, upon the vendee's default in payment, is necessary.

## VI.

### **The Judgment Herein, as Modified, Properly Includes Interest From the Date of Plaintiffs' Claim of Loss.**

- (a) THE DAMAGES CLAIMED, NAMELY, THE AMOUNT OF THE DRAFT, CONSTITUTED A LIQUIDATED DEMAND.

Plaintiffs' loss, due to the failure of defendant to transmit to the bank their telegraphic

instructions not to pay the draft originally designed by them for application on the Pitt and Campbell contract, is measured by *the amount of money which was paid contrary to their desire*; and no other element whatever enters into the determination of the amount of that loss. This is not a case wherein plaintiffs, having paid for and received an article not having an ascertainable value, sue for the difference between its value and the price paid as a result of defendant's failure to intercept their remittance. Such a state of facts would, of course, present a typical case of an unliquidated demand. On the contrary, *plaintiffs received nothing* under the Pitt and Campbell contract. When they determined to withdraw therefrom, they had made an initial cash payment of \$7,500 and had forwarded the draft in question to meet the second of the seven installments. On discovering that the mining stock was valueless, they endeavored to prevent the payment of that installment and thus to confine their loss to the original cash payment. This they were entitled to do, and for that purpose they contracted with defendant *immediately* to transmit and deliver their telegram,—*defendant* INSURING *such immediate transmission and delivery for an extra compensation*. [Findings X and XII, Tr., pp. 52-53, 56.] Defendant negligently delayed the transmission of the message for three days,



with the result that defendant's loss on the Pitt and Campbell contract, instead of being restricted to \$7,500, was increased by the amount of the draft, that is, to \$18,750. Plaintiffs, of course, made no further payment under that contract. They forfeited the \$18,750 [Findings XVII, Tr., p. 60; p. 103] and the Lyon County Bank, pursuant to the terms of the contract, was required to return and did return the stock to Pitt and Campbell.

It is apparent, therefore, that the actual value of the Pitt and Campbell stock does not enter into the question of the determination of plaintiffs' loss. *They were not entitled to the stock unless they elected to make, and did make, full payment.* They were at liberty at any time to elect not to take the stock by failing to make further payment, and their withdrawal from the contract might be for any reason which to them seemed sufficient.

The court found the stock to be in fact valueless. [Findings XVIII, Tr., p. 60.] But suppose the fact were otherwise,—would plaintiffs' loss, by reason of defendant's failure to transmit and deliver the telegram in due season, have been reduced one cent? An answer in the affirmative would presuppose that plaintiffs received the stock under their contract,—which is contrary both to the fact and to the terms of the agreement.

Plaintiffs sought by their telegram,—not to take a step by which would be fixed only one of the terms of an equation for determining their loss,—but to put an end to further responsibility by defaulting in payment and thereby forfeiting \$7,500 before the payment of their draft would increase the forfeiture they were bound to suffer to \$18,750. Their loss was the amount of the draft,—not that amount less some other figure, definite or indefinite,—and it was so expressly found by the lower court. [Finding XX, Tr., p. 61.] Eliminating the initial payment to Pitt and Campbell, the only inquiry necessary or permissible in order to determine the detriment to which they were subjected by “defendant’s gross negligence in failing to transmit and deliver said message immediately, as by it agreed” [Finding XX, Tr., p. 61] is,—“What would have been plaintiff’s loss if defendant had faithfully performed its contract for the immediate transmission and delivery of the telegram?” Plainly the answer is,—“There would have been *no* loss.” The value of the mining stock is a wholly false quantity in the case. It was touched upon at the trial, but it has no legitimate place herein except as bearing upon the quality of the information on which plaintiffs acted in withdrawing from the Pitt and Campbell contract and upon their good faith in so doing.

As plaintiffs were entitled to recover damages *certain in amount*, and as the right to the recovery thereof was vested in them at least as early as the date of the filing of their claim with defendant (June 26th, 1907), it follows that the judgment was properly modified so as to include interest. (Civil Code of California, Sec. 3287.)

We regret that we are unable to present to the court in this connection any authority, precisely in point, illustrative of our contention. Search for such an authority has been in vain, and we can only surmise that our failure in this regard may be due to the fact that, by common understanding in the profession, such a demand as that here in question is conceded to be liquidated.

(b) EVEN IF THE DEMAND HEREIN WERE UNLIQUIDATED, DEFENDANT'S REPUDIATION OF ALL LIABILITY WOULD RENDER INAPPLICABLE THE GENERAL RULE DENYING INTEREST THEREON.

In *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 Atl. 134, it is said:

"Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon liquidated damages is one *well calculated to defeat that purpose* [*i. e., to make fair compensation*] in many cases, and that *no right reason exists for*

*drawing an arbitrary distinction between liquidated and unliquidated damages. \* \* \**

The determination of whether or no interest is to be recognized as a proper element of damage is one to be made in view of the *demands of justice* rather than through the application of any *arbitrary rule*."

65 Atl. 137.

This passage is quoted with approval in 1 *Sedgwick on Damages* (9th ed.), Sec. 315. To the same effect is

*Southern Pacific Co. v. Arnett*, 126 Fed. 75, 80.

See also:

*Nashua, etc. R. R. Corp. v. Boston, etc. R. R. Corp.*, 61 Fed. 237, 250-251;

*Consaul v. Cummings*, 222 U. S. 262, 272-273;

*Spalding v. Mason*, 161 U. S. 375, 395.

In California, express statutory enactment puts the matter to a certain extent, beyond the reach of judicial construction. By section 3287 of the Civil Code, it is provided:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, \* \* \*."

But even in California doubt has been expressed whether interest should *always* be dis-

allowed on unliquidated demands. Thus in *Cox v. McLaughlin*, 76 Cal. 60, the court says:

"We are *not* prepared to say, in general terms, that no interest in any case can be recovered in an action upon contract for an unliquidated demand. \* \* \* in this state interest is allowable on such demand *under some circumstances*."

76 Cal. 71.

And in *Mix v. Miller*, 57 Cal. 356, a creditor was held entitled, under section 3287 of the Civil Code, to interest upon a demand that included, as one item, the *reasonable value* of services rendered in making a search and abstract of title,—clearly an unliquidated sum.

The basis for the rule denying interest, in ordinary cases, on unliquidated demands, is thus stated in *Cox v. McLaughlin*, *supra*,

"The reason of such denial of interest is said to be that the person liable *does not know* what sum he owes, and therefore can be *in no default* for not paying."

76 Cal. 67.

"When the reason of a rule ceases, so should the rule itself." (Civil Code of California, Sec. 3510.) Where the debtor's failure to settle is, *in truth and in fact*, based upon his inability to determine the *amount* justly due from him, and he shows this to be so by an effort to adjust that amount as between himself and

the claimant, the rule denying interest,—so long as it remains upon the statute books,—should be applied. He then is not in default because, while admitting a liability, “he does not know what sum he owes.” But where the person upon whom the claim is made, instead of admitting responsibility and discussing the amount of loss, *denies* all responsibility, the reason for the rule does not exist. He takes it upon himself to *decide that he owes nothing*. He assumes to *know*. He is not withheld from making a tender because he cannot determine the *amount* of his liability. On the contrary, he denies *all* responsibility and is determined to resist any payment whatsoever. Should *he* be shown the tender regard accorded to the man who admits a just liability, but who honestly differs from the claimant as to the amount thereof? If so, not only does the claimant suffer by being deprived during the period of litigation, without compensation, of the use of the money justly due him, but a *direct inducement* is offered every person from whom a demand is owing to *abstain from adjusting and paying the amount thereof*, in order that he may have the use, during that period, of the money which he must ultimately pay. Such a holding would be subversive of the policy of the law to encourage the private settlement of differ-

ences. At the time of judgment, the debtor will, by its terms, be required to pay no more than, in fair dealing, he should have paid at the time the claim arose,—perhaps years before.

Particularly apparent is the absence of the reason for the rule disallowing interest, when defendant denies all liability *and* the award that is by the judgment made to the claimant, is *precisely the sum by him named in his demand*. Then, surely, the defendant is in no position to plead his ignorance of the amount due him in order to escape liability. The event proves the demand to have been a just one which he should have paid, but which he refused to pay either in whole or in part. He who denies a liability *in toto* puts himself in default if, by the judgment, it be proven that in law the liability existed and that it was for an amount accurately measured by the demand; and he should not be permitted to assume a dual role by first *repudiating* responsibility, and, on that responsibility being fastened on him, by then claiming exemption from the payment of interest on the ground that he could not be in default *since he did not know what sum he owed*. (1 *Sedgwick on Damages*, [9th ed.], Sec. 314, citing and quoting *Gray v. Van Amringe*, 2 W. & S. 128.)

The amount awarded plaintiffs herein was the identical sum claimed by them in their written demand on defendant, which demand—so far as regards any action looking to its settlement in whole or in part,—was first totally ignored and then repudiated by defendant. Where there is a duty incumbent upon the person liable, to liquidate a claim, his repudiation of liability and his refusal to liquidate entitle the claimant to interest from the date of such repudiation and refusal. (*Bernard v. Rochester German Insurance Company*, 79 Conn. 388, 65 Atl. 134.)

See also:

*White v. Miller*, 78 N. Y. 393, 399;

*City of Louisville v. Henderson's Trustee*, 11 Ky. L. Rep. 796, 13 S. W. 111, 112;

*Schmidt v. Louisville, etc. Ry. Co.*, 95 Ky. 289, 26 S. W. 547;

*Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547, 39 S. W. 1021;

*Kohlberg v. Havens*, 182 Pac. 467, 469 (Cal. App.).

In *Fairchild v. Bay Point etc. Ry. Co.*, 22 Cal. App. 328, the contract sued on provided that certain work should be paid for by the reimbursement of plaintiffs for its cost and adding ten per cent thereto. Respecting interest on the demand, the court said:



"Nor would the fact that the defendant *denied the amount* of the cost charged against it, *if the court found against defendant's contention*, deprive the plaintiff of the right to recover interest."

22 Cal. App. 331.

In the case at bar, defendant did not merely dispute the *amount* of an admitted liability. On the contrary, it denied *all* liability. It is unnecessary to cite the particulars of its recalcitrancy as exhibited by the evidence. Suffice it to refer to its answer to plaintiffs' complaint, wherein it repudiated all responsibility (1) by denying any special contract with, or the payment of an extra toll by, plaintiffs, (2) by taking refuge behind the stipulations on the message blank, and (3) by endeavoring to shift the blame to the connecting telephone company. [Tr., pp. 29-32, 34-35, 36.] At the trial, no evidence of values was introduced, but only the testimony of one of the owners of the stock that, *in his opinion*, the same was more valuable than the amount that remained payable under the Pitt and Campbell contract after the application of the draft thereon. The court found, contrary to this opinion evidence, that the stock was practically valueless. [Finding XVIII, Tr., p. 60.]

The record demonstrates that this is a case,—not where defendant was in ignorance, as a

matter of *fact*, of the *quantum* of its liability,—but where defendant, as a matter of *law*, denied *all* responsibility. Ignorance of the law is no excuse; and when defendant seeks to justify itself in *point of law alone*, it hardly lies in its mouth to claim an exemption from the payment of interest upon the ground that the demand, being unliquidated in point of *fact*, defendant could not know what sum it owed plaintiffs.

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It might be further contended by plaintiffs (on the authority of certain of the cases), that even if the worthlessness of the mining stock which was the subject-matter of the Pitt and Campbell contract, were an element entering into to the determination of plaintiffs' loss,—which, however, we deny,—such worthlessness "*could reasonably be ascertained by due inquiry and investigation,*" and that, "whatever may be true under other circumstances, the wrongdoer who neglects to ascertain it ought, in fairness, if it becomes necessary to sue for compensation, to be made to pay, not only what was thus originally due, but also damages for his delay in not paying it without judicial compulsion." (*New York etc. Ry. Co. v. Ansonia Land and Water Co.*, 72 Conn. 703, 46 Atl. 157, *per* Baldwin, J.) By the term "damages" the court there referred to interest.

So, also:

*Schmitt Bros. v. Boston Insurance Co.*,  
81 N. Y. Supp. 767, 770;

*Van Rensselaer v. Jewett*, 2 N. Y. 136,  
140;

*Loomis v. Gillett*, 75 Conn. 298, 53 Atl.  
581.

Authority might also be cited to the proposition that "the allowance of interest on plaintiff's claim from the time of the *commencement of the suit* although the amount was *then unliquidated*," would in any event have been proper. (*McCollum v. Seward*, 62 N. Y. 316.) However, we do no more than to suggest these considerations.

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By no means do plaintiffs consider that they are here required to combat either the general rule denying interest on unliquidated demands, or the application of that rule to cases in which the difference between the parties is one of *liability or non-liability*, instead of one merely respecting the amount of an *admitted* liability. Plaintiffs stand squarely upon the indisputable ground that theirs was a *liquidated demand*, and that the only question ever open to dispute between the parties, was whether the defendant was originally liable for \$11,250.00 or

for nothing. This was the amount of the draft paid contrary to plaintiffs' wishes, as expressed in the delayed telegram, and it was so paid through defendant's failure *promptly* to transmit and deliver that message under a *special contract* by which defendant, *for a special consideration, insured promptness*. Plaintiffs received nothing whatever under the Pitt and Campbell contract,—in fact, *could* receive nothing except on full payment thereunder,—and, by its terms and in fact, they forfeited everything they had paid thereon. *Their loss was exactly the amount of the draft*, and not even a computation was required to determine the same. No question of offset as against that loss is present in the case, *since no benefit—liquidated or unliquidated,—accrued to plaintiffs*. We submit, therefore, that plaintiffs are entitled to interest upon their demand from the date of filing their claim in writing with defendant. This is their due, both under section 3287 of the Civil Code of California, and also under that rule of law by which is raised in defendant an implied promise to pay interest. (*Curtis v. Innerarity*, 6 How. 146, 154.)

### Conclusion.

The propositions whereon rests plaintiffs' right to recover herein, have, as we think, been demonstrated. Under their contract with Pitt and Campbell, plaintiffs had the absolute right, by withholding any one of the payments therein specified, to terminate said contract and "*all* rights of *each* of the parties" thereunder. This they sought to do by means of the telegram in question. But even if they had no such right, since it is found that they made no further payment but forfeited all moneys paid thereon and abandoned the contract, and since this is tantamount to a finding that Pitt and Campbell exercised any right of election *they* may have had by declaring a forfeiture, plaintiffs' situation herein is the same as though the termination of the contract had resulted from their exercise of a power given to themselves.

Through gross negligence, defendant delayed for three days the message designed by plaintiffs to intercept payment on their draft, and from such delay plaintiffs suffered a loss in the amount of said draft. Defendant's liability for this loss rests,—not merely on the duty by law imposed upon it to use great care in transmitting and delivering telegraphic messages entrusted to it, and not at all upon any contract supposed to be constituted by the terms printed

on the message blank,—but on a *special contract of insurance* whereby, for a consideration *in excess* of its ordinary tolls, defendant undertook to indemnify plaintiffs for the consequences of any delay. Hence, the stipulations for the limitation of defendant's liability printed on the message blank, have no proper place in the case, for they constitute no part of the contract by the trial court found to have been actually entered into.

But were it otherwise, plaintiffs would still be entitled to recover. Defendant's negligence was found to have been "*gross*"; and from liability for such negligence, a telegraph company cannot, by stipulation, exempt itself to any extent. Moreover, as properly construed, the stipulations on the message blank do not militate against plaintiffs. Thereby a *written* contract is required *only* when the insurance of the message is against *errors in transmission*,—as distinguished from *delays* therein or in delivery.

Under defendant's regulations, the insurance of a message necessarily embraces an order for its repetition. Hence, plaintiffs' was both a "specially insured" and a "repeated" message, according to defendant's classification of telegrams on its message blanks. Yet, as a matter of fact, defendant made no effort to repeat it.

Again, even if the message had not been, in effect, "ordered repeated," the clause of the stipulations limiting defendant's liability for unrepeatd messages would avail it nothing. Repetition is an act that, in its nature, lends itself only to the detection and correction of *errors in transmission*. It therefore can have no efficacy to prevent *delays* in transmission or delivery except such as are due to *errors in the address* of the telegram. Plaintiffs' message was correctly transmitted in all respects, and to apply this stipulation so as to exonerate defendant from liability for a delay due to causes which compliance with its terms would have no tendency to overcome, would render it arbitrary and unreasonable and, to that extent, invalid.

The stipulation of non-liability for messages forwarded over connecting lines,—even if properly in the case at all,—is ineffectual to exonerate defendant, because the whole delay occurred on defendant's own lines, and not on those of the connecting company. In any event, the special contract of insurance comprehended defendant's responsibility as insurer for defaults of the connecting line.

Finally, as plaintiffs' loss was the precise amount of the draft without deduction therefrom of any sum whatsoever, it was a liquidated

demand whereon the judgment, as modified, properly allowed interest.

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Upon the foregoing grounds and upon the authorities herein cited, it is urged that the judgment as modified by the Circuit Court of Appeals, should be affirmed.

Respectfully submitted,

SAMUEL POORMAN, JR.,

*Counsel for Respondents.*





Syllabus

WESTERN UNION TELEGRAPH COMPANY v.  
BROWN, EXECUTOR OF LANGE, ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
NINTH CIRCUIT.

No. 159. Argued January 20, 21, 1920.—Decided May 17, 1920.

One who, in repudiation of a contract which binds him to make a certain payment, sends a telegram to stop a draft previously dispatched to meet the obligation, can not recover the amount from the telegraph company because of its negligent failure to deliver the telegram in time. P. 113.

P and C agreed to sell and deliver, and H and L to buy, take and receive certain shares of mining stock, "upon the following terms and conditions:" The price stated was to be paid part down and the remainder in equal payments on stated future dates; upon the making of the first payment the shares, endorsed in blank, were to be deposited with a bank under an escrow agreement for delivery to H and L when the last payment was made; the bank was constituted the agent of P and C to receive the payments, and, in event of default by H and L, was authorized by the terms of the deposit to deliver all the shares to P and C; whereupon all payments theretofore made should be forfeited to them, and "all rights of each of the parties should forever cease and terminate." *Held*, not an option terminable at the will of the vendees by failure to meet deferred payments, but an absolute agreement on their part to buy, the provision for forfeiture of past payments and termination of the agreement in case of their default being intended for the protection of the vendors, and exercisable at the vendors' election. P. 110. *Stewart v. Griffith*, 217 U. S. 323.

The provision in such contract that upon non-payment of stipulated sums the rights of each of the parties shall cease and determine is the equivalent of a provision that in case of such default the contract shall be "null and void." P. 112.

248 Fed. Rep. 656, reversed.

THE case is stated in the opinion.

*Mr. Beverly L. Hodghead and Mr. Rush Taggart*, with whom *Mr. Francis R. Stark* was on the briefs, for petitioner.

The following were cited as holding that such contracts are absolute agreements to buy as well as to sell and not mere options, and that the forfeiture provision is for the benefit of the vendor. *James, Option Contracts*, § 109; *Stewart v. Griffith*, 217 U. S. 323; *Wilcoxson v. Stitt*, 65 California, 596; *Central Oil Co. v. Southern Refining Co.*, 154 California, 165; *Weaver v. Griffith*, 210 Pa. St. 13; *Vickers v. Electrozone Co.*, 66 N. J. L. 9; *Hamburger v. Thomas*, 118 S. W. Rep. 770; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Jones v. Hert*, 192 Alabama, 111; *McMillen v. Strange*, 159 Wisconsin, 271; *Meagher v. Hoyle*, 173 Massachusetts, 573; *Dana v. St. Paul Investment Co.*, 42 Minnesota, 196; *Shenner v. Pritchard*, 104 Wisconsin, 291.

*Mr. Samuel Poorman, Jr.*, for respondents:

No absolute sale was made. *Ramsay v. West*, 31 Mo. App. 676; *Beckwith-Anderson Land Co. v. Allison*, 26 Cal. App. 473; *Verstine v. Yeaney*, 210 Pa. St. 109; *Pittsburg Brick Co. v. Bailey*, 76 Kansas, 42; *McConathy v. Lanham*, 116 Kentucky, 735; *Williamson v. Hill*, 154 Massachusetts, 117; *Gordon v. Swan*, 43 California, 564. The sale and purchase were declared to be "upon . . . conditions;" and one of those was that upon default by plaintiffs in paying any instalment "all rights of each of said parties hereunder shall forever cease and determine." The intention here was that, upon default, there should be effected automatically a wiping out of all rights of either party. In precise phrase the contract defined the only rights existing in case of default and the very steps to be then taken by the depositary in escrow, and expressly declared the non-existence of any other rights whatsoever.

A forfeiture is not favored by the law; and a forfeiture

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that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor. But where the forfeiture is in a manner compensated for by having the effect of wiping out all rights and liabilities under the contract, there is less reason for viewing it askance. The vendor will always seek to frame the contract in terms giving himself the election either to enforce a forfeiture or to compel a performance. Without a word in the contract on the subject, the law would give him this election. *Glock v. Howard Co.*, 123 California, 1. Therefore, when the parties insert a provision as to forfeiture and the termination of all rights of each of them by the mere fact of defaulting in payment, it is reasonable to suppose that they intended thereby to assent to something different from what the law itself would have read into the contract in the absence of such a provision.

The present is not a case wherein ordinary property was the subject-matter of the contract, as in *Wilcoxson v. Stitt*, 65 California, 596 (city realty); but is one where the investment was of the same hazardous nature as in *Gordon v. Swan*, *supra* (a mine), and in *Williamson v. Hill*, *supra* (patent rights), in the latter of which it was said that the purchaser's right under such a contract was to determine, from time to time, whether he would pay an additional instalment and thus continue the contract in force for a further period, or whether he would forfeit what he had already paid, forego any rights to the property, and escape further liability. Distinguishing: *Cape May Real Estate Co. v. Henderson*, 231 Pa. St. 82; *Wilcoxson v. Stitt*, 65 California, 596; *Stewart v. Griffith*, 217 U. S. 323.

MR. JUSTICE DAY delivered the opinion of the court.

This is an action by Brown, executor of Lange, and Hastings to recover damages from the Western Union

Telegraph Company for failure to deliver a message sent by Hastings and Lange to the Lyon County Bank, Yerington, Nevada. A judgment was recovered against the Telegraph Company in the District Court, which was affirmed in the Circuit Court of Appeals for the Ninth Circuit. 248 Fed. Rep. 656. The case is here upon writ of certiorari.

Upon stipulation the case was tried in the District Court without a jury, and the court made findings from which it appears: On March 16, 1907, W. C. Pitt and W. T. Campbell entered into a contract with Hastings and Lange for the sale of 625,000 shares of the capital stock of the Kennedy Consolidated Gold Mining Company. In this contract it was stipulated that Pitt and Campbell agreed to sell and deliver to Hastings and Lange, who agreed to buy, take, and receive from them 625,000 shares of the Kennedy Consolidated Gold Mining Company, upon the following terms and conditions: First. The total price to be paid for the shares of stock to be \$75,000 in gold coin of the United States payable \$7,500 on the execution of the agreement; \$11,250 on or before the first day of May, 1907; and the like sum on or before the 5th of July, 1907, the 5th of September, 1907, the 5th of November, 1907, the 5th of January, 1908, and the 5th of March, 1908. It was agreed that immediately upon payment of the first-named sum, Pitt and Campbell would deposit in escrow in and with the Lyon County Bank, of Yerington, Nevada, certificates of stock indorsed in blank representing in the aggregate 625,000 shares of the capital stock of the Mining Company, and would thereupon enter into an escrow agreement with Hastings and Lange and the bank, under which agreement the bank should hold the shares of stock to be delivered to Hastings and Lange upon the payment by them of the final sum provided for, and the bank was constituted the agent of Pitt and Campbell for the purpose of receiving the payments

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under the agreement, and it was further agreed that in event of default by Hastings and Lange the bank should be authorized under the terms of such deposit in escrow, to deliver all the shares of stock, so deposited with it, to Pitt and Campbell, and all payments theretofore made by Hastings and Lange should be forfeited to Pitt and Campbell, and that thereupon all rights of each of the parties should forever cease and terminate. Hastings and Lange paid to Pitt and Campbell the initial sum of \$7,500, and Pitt and Campbell deposited in escrow with the Lyon County Bank certificates of stock representing 625,000 shares of the stock of the Mining Company properly indorsed, and the bank received said certificates in escrow and held the same in accordance with the contract. After the execution of the contract Hastings and Lange arranged with the bank to treat drafts that they might send it in partial payment as gold coin, and to pay the amount of such drafts in gold coin to Pitt and Campbell under said contract. That, for the purpose of making the payment, mentioned in the contract, which became due on or before May 1, 1907, Hastings and Lange on April 27, 1907, sent by mail from Oakland, California, to the Lyon County Bank, at Yerington, Nevada, a draft for the sum of \$11,250 United States gold coin, payable to the order of the bank; that the draft was received by the bank at Yerington, Nevada, on April 30, 1907, some time between 8:30 A. M., the time the bank opened for business, and 9 o'clock A. M., of that day; that on April 29, 1907, before the message, hereinafter mentioned, was delivered to the Telegraph Company, Hastings and Lange were informed and believed that the stock of the Mining Company was of little or no value, and, upon obtaining such information, they determined to make no further payments on their contract with Pitt and Campbell, and to abandon their rights in and to said stock, and to withdraw from the transaction with Pitt and Campbell. It is further found

that on the evening of April 29, 1907, plaintiffs called at the office of the defendant in Oakland, California, and requested the agent in charge to telegraph the Lyon County Bank at Yerington, Nevada, as follows:

“Oakland, April 29, 1907.

Lyon County Bank,  
Yerington, Nevada.

Draft mailed you Saturday under mistake. Do not pay any sum to Pitt or Campbell. Return draft. Letter follows.

Hastings and Lange.’

Hastings and Lange stated to the agent of the Telegraph Company that it was necessary that the message be delivered to the bank before banking hours on the following morning, that is, before it opened for business on the 30th day of April, 1907, and desired to know of the agent in what manner they could be absolutely assured that the message would be so delivered, stating to the agent that they had a contract for the purchase of certain shares of stock of a mining company, and that payment under the contract was required to be made by them on or before May 1, 1907, to Pitt and Campbell through the bank, and that in default thereof the contract to purchase the stock would by its terms be forfeited, and the rights of the parties thereto would cease and terminate; that for the purpose of making the payment they had mailed to the bank a certain bank draft in the sum of \$11,250; that in the ordinary course of the mail between the city of Oakland, California, and the town of Yerington, Nevada, the same would be delivered to the bank on the following morning, that is to say, during the forenoon of April 30, 1907; that since mailing the draft they had learned facts touching the value of the stock which had determined them to make no further payments and to forfeit the contract and all money by them paid thereunder; that they were seeking

by the message to intercept payment by the bank on account of the contract to said Pitt and Campbell, and that unless such message were transmitted, and delivered immediately to the bank before banking hours on April 30, 1907, it would receive the draft and make payment of the amount thereof to Pitt and Campbell, in which event the amount would be wholly lost to them as they did not intend to continue under their contract, having learned that the stock was of little or no value. It was further found that thereupon the agent represented that the Telegraph Company would insure the immediate delivery of the message to the bank at Yerington if plaintiffs would pay the sum of \$1.45, which sum was in excess of the Company's regular charge. Plaintiffs accepted the proposal, and paid the sum to the agent, and, in the presence of the plaintiffs, the agent thereupon wrote upon the message, immediately below the date thereof, the words: "Deliver immediately," and accepted the message for immediate transmission to the town of Yerington for immediate delivery to the bank and agreed to immediately transmit and immediately deliver it to the bank for the plaintiffs, and assured the plaintiffs of such immediate transmission and immediate delivery thereof; that the sum of \$1.45 was in excess of the defendant's regular charge and usual toll, the usual charge for an unrepeatd message being 98¢, and for a repeated message the sum of \$1.47. The message was written upon a blank form of the Telegraph Company, which is set forth in the findings.

It is further found that neither Hastings nor Lange read the printed matter on the blank, nor was either of them cognizant of the terms and conditions written thereon. The message was not repeated in the manner provided in the stipulations on the blank. That the regular course of communication by telegraph between Oakland, California, and Yerington, Nevada, was by the lines of the Western Union Telegraph Company to Wabuska, Nevada, which



was the terminus of the Telegraph Company's lines for Yerington messages and that in order to transmit telegrams beyond Wabuska it was necessary that they be transmitted from that point over the telephone line of the Yerington Electric Company to Yerington; that each of the companies received all messages offered it by the other company for further transmission, subject to the stipulations on telegraphic blanks, each company having and charging its separate toll. That the offices of the Electric Company and the Telegraph Company were both maintained in the Southern Pacific Railroad Company station at Wabuska, and that the telephone instrument of the Electric Company was within a few feet of the telegraphic instruments of the Telegraph Company; that at the time the Southern Pacific Railroad Company employed an agent at Wabuska to attend to its railway business, and that by an arrangement between the Railroad Company and the Telegraph Company said agent was employed to attend to the telegraph business of the Telegraph Company at Wabuska; that by agreement between the Railroad Company and the Electric Company the agent of the Railroad Company was at the same time employed by the Electric Company to handle the telephone business of the Electric Company; that there was a regular stage line open between Yerington and Wabuska in April and May, 1907; that the distance between Yerington and Wabuska was approximately eleven miles, and could be traversed in the stage in about one and one-half hours.

It is found that the Telegraph Company did not promptly, upon the receipt of the message on the evening of April 29, 1907, transmit it to the town of Wabuska, Nevada; that the defendant did not promptly deliver the message to the Electric Company for further transmission over its telephone line to Yerington, Nevada, but on the contrary defendant wholly failed and neglected

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to transmit the message to Wabuska until May 2, 1907, and wholly failed and neglected to deliver it to the Electric Company until May 2, 1907; that the delay in the transmission of the message occurred wholly on the lines of the Telegraph Company, and was caused by that company, and did not occur on the lines of the telephone of the Yerington Electric Company.

It is further found that if the Telegraph Company had proceeded with reasonable promptness to transmit and deliver the message to the bank, the same would have reached Yerington before the bank had received the draft mailed to it as aforesaid, and it would not have placed the amount represented thereby to the credit of Pitt and Campbell, or either of them, or paid any amount thereon; that by reason of the gross negligence of the Telegraph Company the message was not delivered to the bank until May 2, 1907; that on April 30, between the hours of 8:30 and 9 A. M., the bank had received the draft and thereafter on that day had paid over the amount thereof in gold coin to Pitt and Campbell pursuant to the terms of the contract between the plaintiffs and Pitt and Campbell on account of the payment to be made on or before May 1, 1907, and had given credit to Hastings and Lange for the amount of said payment, all of which was done without any knowledge of said message or the determination of Hastings and Lange to recall said draft; that Hastings and Lange did not make any further payments on the purchase price of said shares of stock, but abandoned the contract with Pitt and Campbell and forfeited and lost all moneys paid thereon.

It was found that the 625,000 shares of stock of the Kennedy Consolidated Gold Mining Company have been at all times, and since and including April 29, 1907, practically valueless.

The Circuit Court of Appeals held: (1) That the contract was an option terminable by the buyers' failure to

make the payments required; (2) The oral agreement for the transmission of the message was a binding agreement upon the Western Union Telegraph Company; (3) That under the circumstances the Telegraph Company was guilty of gross negligence in failing to transmit and deliver the message. The court thereupon affirmed the judgment of the District Court for the amount of the payment, adding interest.

In our view of the case it is unnecessary to consider the correctness of the decision of the Circuit Court of Appeals as to the binding obligation of the oral contract made with the agent of the Telegraph Company, or the question of negligence of the Company in the transmission and delivery of the message. The right of Hastings and Lange to recover was based upon the theory that the contract was an option terminable by the act of the buyer in failing to make the payment on the contract, which payment, it is found, would not have been made had the message been promptly delivered. An option is a privilege given by the owner of property to another to buy the property at his election. It secures the privilege to buy and is not of itself a purchase. The owner does not sell his property; he gives to another the right to buy at his election.

What then is the nature of this agreement? It contains the positive undertaking of the owner to sell and the purchaser to buy 625,000 shares of stock upon terms which are named. Upon the first payment being made, the certificates are to be deposited with the bank in escrow, to be delivered when the final payment agreed upon is made, and in event of default in payment the bank is authorized to deliver the shares of stock to Pitt and Campbell, and all payments are to be forfeited, and the rights of the parties to cease and determine. We are of opinion that this is far more than a mere option to purchase, terminable at the will of the purchaser upon failure

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to make the payments required. The agreement contains positive provisions binding the owner to sell and the purchaser to buy upon the terms of the instrument. It is true the stock is to be deposited with the bank in escrow, and it is authorized to deliver the same to Pitt and Campbell upon default in payment. The findings do not show whether Pitt and Campbell took back the stock upon default of subsequent payments. There was no understanding that Pitt and Campbell should take back the stock when the payments were not made, and no agreement which put it in the power of the purchasers to relieve themselves of the obligations of their contract by failing to keep up the payments. The right of Pitt and Campbell to receive the stock from the bank and end the contract was stipulated; it was a provision inserted for their benefit, of which they might avail themselves at their election.

In our opinion *Stewart v. Griffith*, 217 U. S. 323, is controlling upon this point. In that case there was a sale of land and the purchaser by the terms of the agreement paid \$500 as part of the purchase price. It was provided that in case of non-payment of the balance of the first half of the purchase price on November 7, 1903, the \$500 paid on the contract was to be forfeited and the contract of sale and conveyance was to be null and void and of no effect. The contention was that the defendant was free to withdraw from the contract if he chose to lose the \$500. But this court held, after considering the terms of the contract, that the \$500 was part of the purchase price to be paid; that the land was described as being sold, and that in view of such stipulations, the purchaser had bound himself to take the land. As to the provision for the forfeiture of the \$500, and the stipulation that the contract should become null and void upon non-payment of the remainder of the purchase price, this court said: "The condition plainly is for the benefit of

the vendor and hardly less plainly for his benefit alone, except so far as it may have fixed a time when Stewart might have called for performance if he had chosen to do so, which he did not. This being so, the word void means voidable at the vendor's election and the condition may be insisted upon or waived at this choice. *Insurance Co. v. Norton*, 96 U. S. 234; *Oakes v. Manufacturers' Insurance Co.*, 135 Massachusetts, 248, 249; *Titus v. Glen Falls Ins. Co.*, 81 N. Y. 410, 419."

The condition in the contract in *Stewart v. Griffith* that non-payment should render the contract null and void is the equivalent of the stipulation in the present agreement, much relied upon by the respondents, that upon non-payment of the stipulated sums the rights of each of said parties should cease and determine. We think the attempted distinction between *Stewart v. Griffith* and the instant case is untenable.

The Circuit Court of Appeals reinforced its conclusion that the contract was an option by stating that it was usual to sell mining property under privileges of purchase, and when investigation showed that the property was not valuable, to terminate such options by forfeiting the sums paid therefor, and declining to make future payments. It is true that undeveloped mining property is often sold under option agreements. (See 3rd Lindley on Mines, § 859.) But there is nothing to show that this contract was dependent upon the development of the mining property. The written agreement contains a positive undertaking to sell upon the one part, and upon the other part to buy shares of the mining stock. Whether the shares sold constituted all the shares of the company does not appear. Nor is the relative proportion of those sold to the whole amount of the stock anywhere shown. The fact that the contract contains a privilege of ending it at the election of the vendor for non-payment of the sum stipulated, does not convert it into an option ter-

minable by the purchasers at their will. *Stewart v. Griffith, supra.*

As the recovery of the amount paid, with interest, as adjudged in the Circuit Court of Appeals, is founded upon its conclusion that the contract was an option, and the damages the amount paid and forfeited by the failure to stop the payment of the draft, and as we are not able to accept that view of the contract, it follows that the judgment of the Circuit Court of Appeals must be reversed, and the cause remanded to the District Court for further proceedings in conformity to this opinion.

*Reversed.*

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